

No. 14037

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

TILLIE MELY, as Administratrix of the Estate
of A. E. Mely, Deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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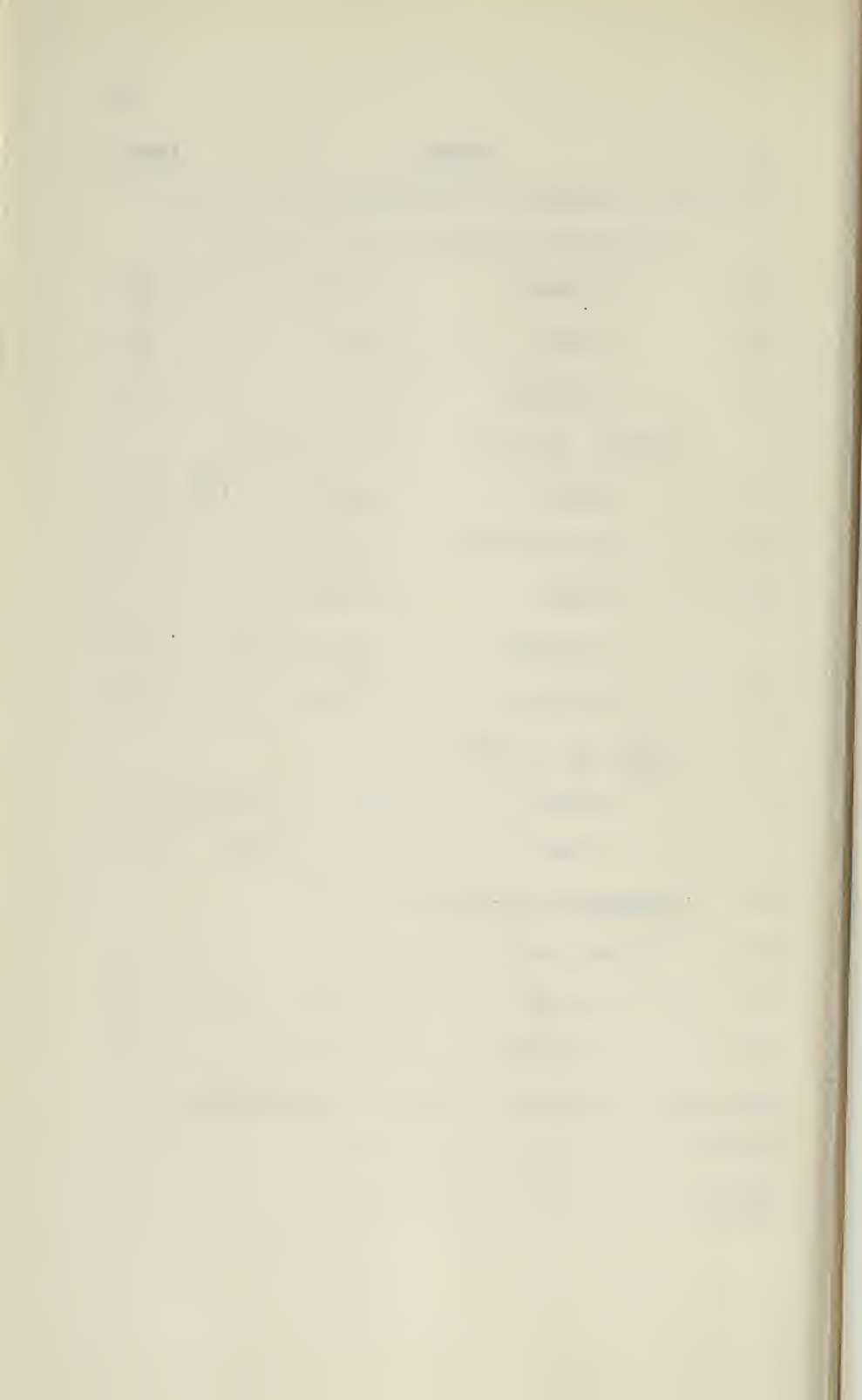
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NAMES AND ADDRESSES OF ATTORNEYS

CANNON, McKEVITT & FRASER,
711 Old National Bank Building,
Spokane, Washington;

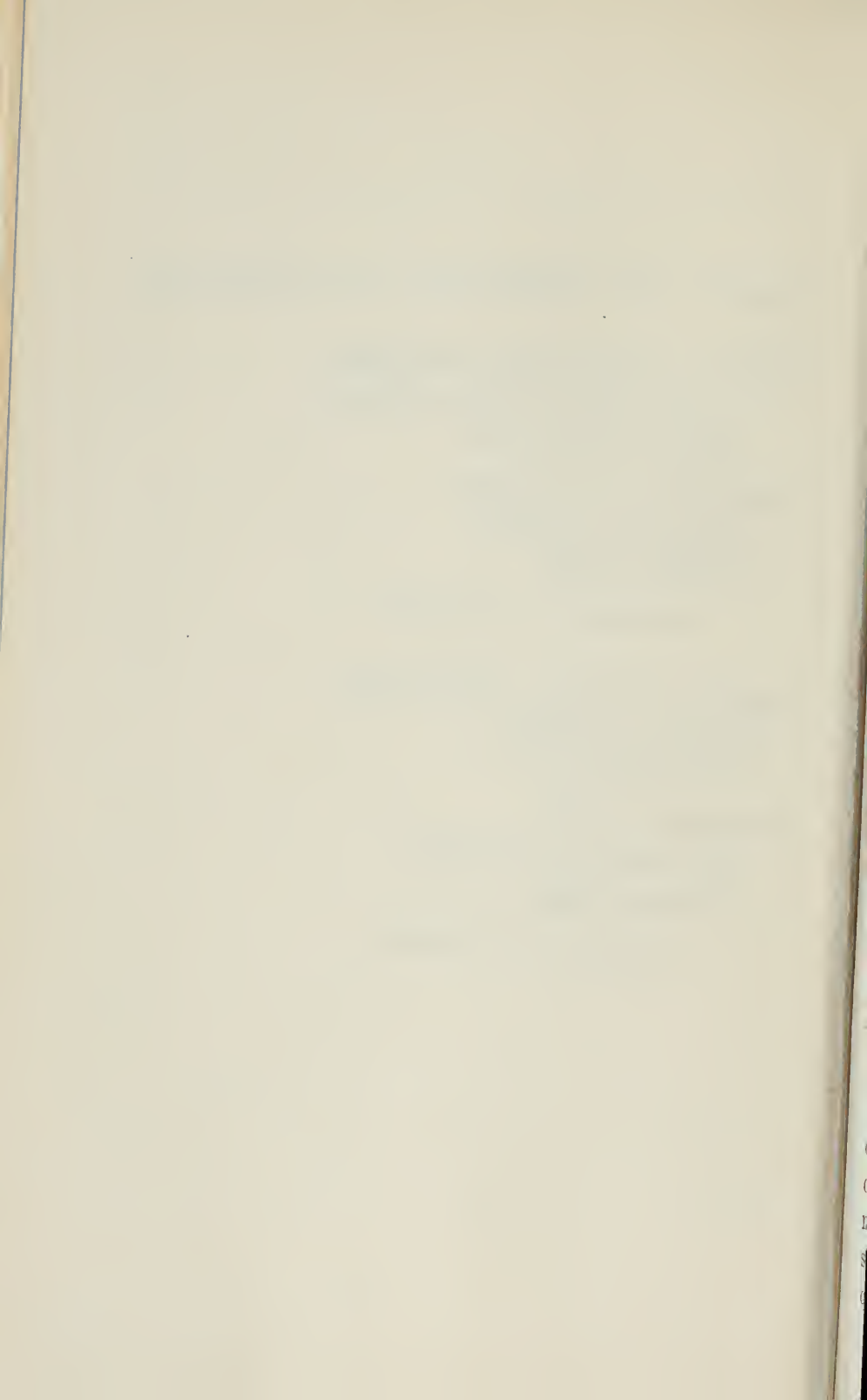
VERNER R. CLEMENTS,
Weisgerber Building,
Lewiston, Idaho,

Attorneys for Appellant.

MAURY, SHONE & SULLIVAN,
33 Hirbour Building,
Butte, Montana;

PAUL W. HYATT,
205 Weisgerber Building,
Lewiston, Idaho,

Attorneys for Appellee.



United States District Court for the District of
Idaho, Central Division

No. 1862

TILLIE MELY, as Administratrix of the Estate
of A. E. Mely, Deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

COMPLAINT

Plaintiff, for claim and demand against defendant, alleges:

1.

This action is brought under the Federal Employer's Liability Act, 45 U. S. C. A., Sec. 51 et seq., for damages arising from the death of A. E. Mely.

By order of court duly given and made Tillie Mely was, on the 7th day of December, 1951, duly and regularly appointed Administratrix of the Estate of A. E. Mely, deceased, by the Superior Court of the State of Washington, in and for the County of Spokane, and thereafter, and in accordance with said order so appointing her, she duly qualified as such administratrix, and on the 7th day of December, 1951, she received her Letters of Administration of said estate, and ever since said time she has been, and now is, the duly appointed, qualified and acting administratrix of the Estate of

A. E. Mely, deceased, and her Letters of Administration have never been revoked.

2.

During all of the times herein mentioned, the defendant, Northern Pacific Railway Company, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and was and is a common carrier by railroad of freight and passengers, and owns and operates in Interstate Commerce a railroad situated between the cities of Lewiston, Idaho, and Spokane, in the State of Washington, and said defendant at all times herein material was doing business at the commencement of this action at Arrow, in the State of Idaho.

3.

Defendant, long prior to November 11, 1951, and on said date, employed plaintiff's decedent as an engineer on its locomotives, and on said 11th day of November, 1951, plaintiff's decedent was employed as engineer on a Diesel locomotive to work on freight trains loaded and unloaded with freight, and being shipped and received by defendant in Interstate Commerce, and on or about November 11, 1951, while plaintiff's decedent was still an employee of the defendant as such engineer, at about the hour of 11:15 o'clock a.m., and at the time A. E. Mely was killed, as hereinafter alleged, his said duties as such employee of defendant were in furtherance of Interstate Commerce between the cities of Lewiston, Idaho, and Spokane, Washington, and his said

duties did, as such employee and engineer, in many ways directly or closely and substantially affect such commerce as above set forth.

At all times herein mentioned defendant owned and maintained the railroad tracks, the railroad bed, and the railroad right-of-way upon which the collision hereinafter mentioned occurred, and all persons working upon, in, or about the engine and train which plaintiff's decedent was operating, and the engine and train with which the collision hereinafter mentioned occurred, were all servants, employees and agents of the defendant company. Plaintiff's decedent was the engineer of the Northern Pacific Railway Company's engine No. 6015 going east, and it collided with a train of cars being hauled by the Northern Pacific Railway Company's engine No. 1648 going East.

4.

That on November 11, 1951, at about the hour of 11:15 a.m., plaintiff's decedent, as engineer of defendant's engine No. 6015, while acting in the course and scope of his employment with defendant Company, and while said engine and train being so operated by him, which had the right-of-way, and was a through train, approached the station of Arrow Junction in the State of Idaho, the defendant, by and through its servants, employees and agents, on defendant's train No. 1648 going East, and while they were acting within the course and scope of their employment with defendant Company, and in pursuance of their duties incident thereto,

negligently caused, allowed and permitted train No. 1648 going East to stop on a sharp, blind curve on the main line track for more than 45 minutes during switching operations, where its view by plaintiff's decedent was obstructed, and thereby, and because of the negligent acts of commission and omission, in whole or in part, of defendant, its servants, agents and employees, and by reason of defects and insufficiencies, due to defendant's negligence in its cars, engines, appliances, machinery, track and road bed, train No. 6015 crashed into, and collided with the rear end of train No. 1648, and thereby A. E. Mely was killed.

5.

The negligence of defendant consisted of the following acts, to wit:

(1) Failure to provide A. E. Mely a safe place to work.

(2) Failure to provide and supply proper, safe and adequate equipment.

(3) Running and operating train No. 6015 on its line without a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train could control its speed without requiring brakemen to use the common hand-brake for that purpose.

(4) Running and operating train No. 6015 on its line without coupling the air-hoses.

(5) Running and operating train No. 6015 on

its line without connecting the air between engine No. 6015 and the cars following in said train.

(6) Instructing engineers on its line to disregard Company rules while proceeding through station yards.

(7) Compelling engineers on its line to proceed according to time schedules, regardless of Company rules.

(8) Allowing train No. 1648 to stop on a sharp, blind curve for switching purposes, well knowing the schedule and exact arrival of train No. 6015 at the place where the collision occurred.

(9) Failure to provide and equip its railroad system at the place of collision with a signal block system to warn plaintiff's decedent of the voluntary obstruction ahead, as herein alleged.

(10) Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged.

(11) Failure to place men, flares, or signals to give warning of said obstruction of said track a reasonable distance from said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision.

(12) Failing to properly protect train No. 1648 while it was in such obscure position aforesaid, and in failing to properly protect train No. 6015 from colliding therewith, by notice, signal, warning, flares, orders, or any other kind of notice sufficient to warn

A. E. Mely of the obstruction of said main line track.

6.

That the said A. E. Mely at the time of his death was fifty-five years of age, and his wife, for whose benefit this action is brought, was at the time of the death of her husband fifty-one years of age; that A. E. Mely had an expectancy of life of 21 years, and his wife, for whose benefit this action is brought, at the time of her husband's death, had a life expectancy of 27 years; that at the time of his death, A. E. Mely had an expectancy of life of 21 years, and earning, and capable of earning the sum of Five Hundred (\$500) Dollars to Five Hundred Fifty (\$550) Dollars per month, and from his said monthly earnings he contributed monthly to his wife, for whose benefit this action is brought, for her support, and for her maintenance, the necessary sum of Two Hundred (\$200) Dollars per month, and she was his sole and only heir and beneficiary; that at all times during the married relation between A. E. Mely and his wife, for whose benefit this action is brought, the said A. E. Mely gave to his said wife financial support, and the best of care, comfort and society and companionship, and each was very affectionate one toward the other, and their lives while living together were constantly filled with happiness, comfort and companionship; that by reason of the death of A. E. Mely, his widow, for whom this action is prosecuted, has been entirely deprived of all financial support, and has suffered great loss of the comfort, society and companionship which she was receiving from her

said husband. That by reason of the death of the said A. E. Mely, the plaintiff herein has been compelled to, and has incurred funeral expenses for the burial of her husband of the reasonable and necessary value of Eleven Hundred (\$1,100.00) Dollars.

7.

That by reason of the negligent acts of the defendant, its servants, agents, and employees, and as a direct or contributory proximate result thereof, in whole or in part, this plaintiff, for the benefit of the widow of the said A. E. Mely, deceased, has been, and now is, damaged by defendant in the sum of Thirty-five Thousand (\$35,000) Dollars, no part of which has ever been paid.

Wherefore, plaintiff prays judgment against the defendant for the sum of Thirty-five Thousand (\$35,000) Dollars, and for her costs of suit herein expended.

MAURY, SHONE &
SULLIVAN,

By /s/ A. G. SHONE,

/s/ PAUL W. HYATT,

Attorneys for Plaintiff.

[Endorsed]: Filed June 12, 1952.

[Title of District Court and Cause.]

ANSWER

For its answer to the complaint of plaintiff the defendant admits, denies and alleges as follows:

I.

Defendant admits paragraphs I, II and III of said complaint.

II.

Answering paragraph IV of said complaint, defendant denies each and every matter and thing therein contained.

III.

Answering paragraph V of said complaint, defendant denies each and every matter and thing therein contained.

IV.

Answering paragraph VI of said complaint, defendant has no knowledge or information sufficient to form a belief as to the matters and things therein contained and therefore denies the same.

Further answering said paragraph, defendant specifically denies that as the result of any negligent act on the part of said defendant the plaintiff has incurred the expense therein referred to in the sum of \$1,100.00 or any sum whatsoever.

V.

Answering paragraph VII of said complaint, defendant denies each and every matter and thing therein contained, and specifically denies that as

the result of any negligent act on the part of said defendant the plaintiff has been damaged in the sum of \$35,000.00 or any sum whatsoever.

Further answering said complaint and by way of an Affirmative Defense thereto defendant alleges as follows:

I.

That the death of A. E. Mely was caused and brought about solely and alone through the negligence of the said A. E. Mely, which negligence was the direct and proximate cause of his death.

Wherefore, defendant having fully answered prays that this action be dismissed and that it have and recover its costs necessarily expended herein.

CANNON, McKEVITT &
FRASER,

By /s/ F. J. McKEVITT,

/s/ VERNER R. CLEMENTS,
Attorneys for Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed August 14, 1952.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTION No. 6

The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:

“Within yard limits, second and inferior class, extra trains and engines must move at restricted speed.”

The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:

“Restricted Speed—Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced.”

I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.

I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff's decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.

I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find for the plaintiff, and against the defendant, and assess damages against the defendant in the sum of \$15,000.00.

/s/ LOUISE B. GRAVE,
Foreman.

[Endorsed]: Filed October 2, 1952.

United States District Court for the District of
Idaho, Central Division

No. 1862

TILLIE MELY, as Administratrix of the Estate
of A. E. Mely, Deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on September 29, 1952, et seq., both the parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of \$15,000.00,

not otherwise, then the defendant moves the Court for a new trial upon the following grounds, to wit:

I.

The verdict and judgment are contrary to law.

II.

The verdict and judgment are contrary to the evidence and against the weight of the evidence.

III.

There was no substantial evidence that the defendant was guilty of negligence, which negligence in whole or in part contributed to the death of plaintiff's husband.

IV.

The evidence conclusively shows that the sole proximate cause of decedent's death was his own negligence.

V.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of the plaintiff's case.

VI.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of all the evidence.

VII.

There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

VIII.

The verdict is excessive and appears to have been given under the influence of passion and prejudice.

IX.

The Court erred in failing to give the following instruction requested by defendant, or an instruction substantially similar thereto:

“The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:

“ ‘Within yard limits, second and inferior class, extra trains and engines must move at restricted speed.’

“The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:

“ ‘Restricted Speed—Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced.’

“I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.

“I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff’s decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.

“I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

“If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant.”

Exception to the Court's failure to give the above instruction was duly and timely taken and noted.

X.

The Court erred in admitting over the objection of defendant the testimony of plaintiff's witness, Merle C. Myhre, called by plaintiff for the sole purpose of testifying as an expert as to the meaning, interpretation and application of the rules of the defendant, Northern Pacific Railway Company, admitted in evidence and designated as “Consolidated Code of Operating Rules and General Instructions.” Said rules were plain and unambiguous and there was no necessity for plaintiff to have called an expert witness to testify as to their meaning and application.

XI.

The Court erred in admitting over defendant's objection Rules 99, 101 and 108 of the Consolidated Code of Operating Rules and General Instructions above referred to.

XII.

The verdict of the jury was based upon a supposed fact not established by the evidence, which supposed fact was the sole and only ground upon which the opening and closing arguments of plaintiff's counsel were addressed to the jury.

The above motions, and each of them, are based upon the files and records herein and upon the

affidavits hereto attached, which affidavits are made a part hereof as though fully set forth herein.

CANNON, McKEVITT &
FRASER,

By /s/ F. J. McKEVITT.

CLEMENTS & CLEMENTS,

By /s/ VERNER R. CLEMENTS,
Attorneys for Defendant

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Lewis—ss.

Ernest M. Lauby being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the above-entitled Federal Court beginning September 29, 1952, and ending October 2, 1952.

In the course of the deliberations of the jury, the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left

ahead of Extra 6015. This was the reason why the jury requested further instructions in this regard. During the deliberations of the jury, Juror Merle F. Denevan of Bovill, Idaho, represented that he had had previous experience as a railroad employee and from that experience he knew that in a case like the one then being considered by the jury, that the dispatcher at Lewiston, Idaho, under the rules of railroading, should have notified the members of train crew Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later in the same morning by Extra 6015 and that the dispatcher was required to advise the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. After the jury had requested further instructions in regard to the dispatcher being required to notify the two train crews under the rules and not having been further instructed, they returned to their jury room for further deliberations and after Juror Merle F. Denevan had related his experience as a railroader as herein above set forth, the jury reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both train crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Nez Perce, Ida., this 9th day of October, 1952.

/s/ ERNEST M. LAUBY.

Subscribed and sworn to before me this 9th day of October, 1952.

[Seal] /s/ H. F. BRAUN,
Notary Public in and for the State of Idaho, Residing at Lewiston, therein.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Idaho—ss.

John M. Flerehinger being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the above-entitled Federal Court, beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury, the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instructions in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern

Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Kooskia, Idaho, this 9th day of October, 1952.

/s/ JOHN M. FLEREHINGER.

Subscribed and sworn to before me this 9th day of October, 1952.

[Seal] /s/ H. F. BRAUN,
Notary Public in and for the State of Idaho, residing at Lewiston, therein.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Jonathan Gering, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning

of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Rt. 1, Idaho, this 8th day of October, 1952.

/s/ JONATHAN GERING.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Re-
siding at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Paul H. Dinsen, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Genesee, Idaho, this 8th day of October, 1952.

/s/ PAUL H. DINSEN.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, re-
siding at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. William Huffman whose true name is Alice Huffman, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ ALICE HUFFMAN,

/s/ MRS. WILLIAM HUFFMAN.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Re-
siding at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. E. C. Fish whose true name is Clara Fish, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015

that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ CLARA FISH,

/s/ MRS. E. C.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Re-
siding at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. C. L. Dix whose true name is Juanita Dix, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ JUANITA DIX,

/s/ MRS. C. L.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Re-
siding at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. Erwin Grave, whose true name is Louise Baker Grave, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ LOUISE BAKER GRAVE,

/s/ MRS. ERWIN.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Re-
siding at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Latah—ss.

Mrs. Kenneth M. Hunter (whose true name is Maud H. Hunter), being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the Federal Court beginning September 29, 1952, and ending on October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra Engine 6015, and also requiring the dispatcher to have

advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instruction in this regard. The jury in its further deliberations reached the conclusion that there was a rule of the Northern Pacific Railway Company to give the members of both crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Moscow, Idaho, this 8th day of October, 1952.

/s/ MAUD H. HUNTER,

/s/ MRS. KENNETH M.

Subscribed and sworn to before me this 8th day of October, 1952.

[Seal] /s/ V. R. CLEMENTS,
Notary Public in and for the State of Idaho, Re-
siding at Lewiston, Idaho.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Idaho—ss.

Alfred F. Killmar, being first duly sworn upon oath, deposes and says:

I was one of the jurors in the trial of the above-entitled action in the above-entitled Federal Court beginning September 29, 1952, and ending October 2, 1952.

In the course of the deliberations of the jury the question arose as to whether or not there was a rule of the Northern Pacific Railway Company which required its dispatcher at Lewiston, Idaho, to have notified the members of the train crew of Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later on the same morning by Extra 6015, and also requiring the dispatcher to have advised the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. This was the reason why the jury requested further instructions in this regard. During the deliberations of the Jury, Juror Merle F. Denevan of Bovill, Idaho, represented that he had had previous experience as a railroad employee and from that experience he knew that in a case like the one then being considered by the Jury, that the dispatcher at Lewiston, Idaho, under the rules of railroading, should have notified the members of train crew Extra 1648, which departed from Lewiston on the morning of November 11, 1951, that it would be followed later in the same morning by Extra 6015 and that the dispatcher was required to advise the members of the crew of Extra 6015 that Extra 1648 had left ahead of Extra 6015. After the jury had requested further instructions in regard to the dispatcher being required to notify the two train crews under the rules and not having been further instructed, they returned to their jury room for further deliberations and after Juror Merle F. Denevan had related his experience as a railroader as herein above set forth, the jury reached the con-

clusion that there was a rule of the Northern Pacific Railway Company to give the members of both train crews this information and that the dispatcher violated this rule. This was the sole reason why I reached the conclusion that the Northern Pacific Railway Company was guilty of negligence.

Dated at Kamiah, Idaho, this 9th day of October, 1952.

/s/ ALFRED F. KILLMAR.

Subscribed and sworn to before me this 9th day of October, 1952.

[Seal] /s/ H. F. BRAUN,
Notary Public in and for the State of Idaho, Re-
siding at Lewiston, therein.

[Endorsed]: Filed October 11, 1952.

[Title of District Court and Cause.]

ORDER

This matter came before the court on Defendant's Motion for Judgment N.O.V. and for a New Trial. Oral argument and briefs submitted by respective counsel have been duly considered by the court.

It appears that there is only one point in question here and that is whether it was proper for the court to permit expert witnesses to testify as to the meaning and interpretation of the operating rules of the railroad. However, it is not necessary

for the court to pass on this question because the propriety of the testimony was waived by counsel for both parties, when they refused the court's offer to instruct the jury to disregard this portion of the testimony.

It further appears that none of the other points urged in support of the motions have sufficient merit to justify a judgment n.o.v. or a new trial.

Now, Therefore, It Is Hereby Ordered that the Motion for Judgment N.O.V. be and the same hereby is denied and it is further ordered that the Motion for New Trial be and the same hereby is denied.

Dated this 3rd day of June, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed June 3, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Northern Pacific Railway Company, a corporation, hereby appeals to the United States Court for the Ninth Circuit from the final judgment entered in the above entitled action on October 3, 1952.

Notice Is Also Given that the Northern Pacific Railway Company, a corporation, appeals from that certain order entered in the above entitled action on June 3, 1953, denying the motion of de-

fendant, Northern Pacific Railway Company, a corporation, to set aside the verdict returned in said action and the judgment entered thereon or in the alternative for a new trial, and from each and every part of said order.

/s/ F. J. McKEVITT,

/s/ V. R. CLEMENTS,

Attorneys for Defendant.

[Endorsed]: Filed June 26, 1953.

In the United States District Court for the District
of Idaho, Central Division

No. 1862

TILLIE MELY, as Administratrix of the Estate of
A. E. Mely, Deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

TRANSCRIPT

This cause was heard before the Honorable Chase A. Clark, United States District Judge for the District of Idaho, sitting with a Jury, at Moscow, Idaho, September 29, 1952.

Appearances :

PAUL HYATT, ESQ.,
ALFRED GEORGE SHONE, ESQ.,
Attorneys for the Plaintiff.

F. J. McKEVITT, ESQ.,
VERNER R. CLEMENTS, ESQ.,
Attorneys for the Defendant.

September 29, 1953, 10 A.M.

(Selection of jury.)

(Opening statement by Mr. Shone.)

Mr. Shone: May we dictate a stipulation into the record?

The Court: Yes, you may.

Mr. Shone: The Plaintiff offers in evidence 12 photographs, marked Plaintiff's exhibits 1 to 12.

Mr. McKevitt: One to twelve inclusive?

Mr. Shone: One to twelve inclusive—and the attorneys for the Defendant have agreed and stipulated that these may be introduced in evidence subject to our explanation.

The Court: They may be admitted.

Mr. Shone: Do you want me to do this with your exhibits?

Mr. McKevitt: We prefer to put on our own evidence.

Mr. Shone: They Were Being Marked by the Clerk so that they could be marked in order.

Mr. McKevitt: But I would prefer to put in our evidence when the time comes.

Mr. Shone: I was taking the advice of the Clerk.

Mr. McKevitt: Did the Clerk advise you to put in our evidence?

Mr. Shone: No—no—just for the numbers of the exhibits. [3*]

Mr. Shone: It is stipulated between Counsel for both parties that on November 11, 1951, according to the American Experience Mortality Table A. E. Mely had an expectancy of life, of 17.4 years and that Tillie Mely, his wife, on November 11, 1951, had an expectancy of life of 20.2 years.

It is stipulated by counsel for both sides that on November 11, 1951, and at the time of the collision in question, it was 258 feet from the switch east to the rear of the west car on the south siding. It is also stipulated that it is 604 feet from the switch east to the rear of the caboose on the main line, that was standing there on November 11, 1951; that it is 346 feet from the rear of the caboose west to the rear of the west car on the south siding. It is stipulated that a logging car is 47½ feet in length—

Mr. McKevitt: No, we wont stipulate to that. We will not stipulate that they are that long, our testimony will show that they are 40 feet long. I will stipulate that they are 40 feet long.

Mr. Shone: I took it from the man that made the map for you.

Mr. McKevitt: That would make quite a [4] difference in eighty cars.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Shone: That is satisfactory to us. We will stipulate they are 40 feet long. That a boxcar is 40 feet in length, is that true?

Mr. McKevitt: We have various lengths of boxcars.

Mr. Shone: What is the average?

Mr. McKevitt: We have 36, 40, 42½, 45, 47½.

Mr. Shone: That a boxcar averages 47½ feet in length——

Mr. Clements: They don't average 47½.

Mr. McKevitt: It would depend on what you have in the train, they may all be 40's.

Mr. Shone: Have you any measurements on the boxcars?

The Court: Can you stipulate on the length of the boxcars?

Mr. Clements: Not on the boxcars, your Honor.

The Court: If you can't stipulate go ahead.

Mr. McKevitt: We want to be reasonable, we will stipulate on 45.

Mr. Shone: All right, 45 on boxcars and 40 on logging cars.

Now, we have agreed with you as to certain evidence and you want to reserve that until later on. [5]

Mr. McKevitt: Do you have anything else?

Mr. Shone: No, I think that is all we have on that. Do you care to make a statement now.

Mr. McKevitt: Mr. Shone, you go ahead with your case, we will put our evidence in when you finish.

Mr. Shone: May I explain our exhibits, our photographs to the jury at this time?

Mr. McKevitt: I think that is proper for argument your Honor, not to have counsel tell the jury—

The Court: I understood that the pictures were admitted in evidence and that you would put on a witness to explain them.

Mr. Shone: If I put on associate counsel to explain these pictures would we have a right to make his argument to the jury, to explain how they were taken?

The Court: I can't permit that—haven't you a witness that knows about these pictures?

Mr. Shone: No, we were both there on one set, and the other, he was there.

The Court: They are admitted in evidence you can explain them in your argument to the jury, and they may be handed to the jury now. We can proceed while the jury is looking at the pictures.

DAVID A. LIVINGSTONE

called as a witness by the Plaintiff, after being first duly sworn testifies as follows: [6]

Direct Examination

By Mr. Shone:

Q. Mr. Livingstone, where do you live?

A. Lewiston.

Q. How long have you lived in Lewiston?

A. About thirty years.

Q. That's Lewiston, Idaho?

A. Yes, sir.

Q. What is your occupation?

(Testimony of David A. Livingstone.)

A. I am a brakeman on the Northern Pacific.

Q. How long have you been a brakeman?

A. Since February, 1936.

Q. You were a brakeman on November 11, 1951?

A. Yes, sir.

Q. On what train?

A. On the extra East, Stites local.

Q. Do you remember the number?

A. I think it was 1618, I am not sure.

Q. Could it be 1648?

Mr. McKevitt: We will agree that it was.

The Court: That is agreed, go ahead.

Q. Where did that train start from on November 11, 1951? A. East Lewiston.

Q. Do you remember what time it left East Lewiston? A. No, I don't. [7]

Q. Do you know the approximate time?

A. Well, it was about 9:15 or 20.

Q. In the morning, a.m.? A. Yes.

Q. When you left East Lewiston what character of train did you have, or load, or cars?

A. We had only the caboose at East Lewiston, we picked up the train at Forbay.

Q. How far is Forbay from East Lewiston?

A. About two miles.

Q. And you left East Lewiston with what—a diesel? A. No.

Q. A regular steam locomotive? A. Yes.

Q. And a caboose? A. Yes.

Q. And at Forbay what did you do?

A. We stopped the caboose on the train, on the

(Testimony of David A. Livingstone.)

rear end and went around on the head end coupled on with the engine and made the air test.

Q. How many cars did you couple on?

A. I think it was 86.

Q. And you left there and went to what station?

A. We went back to East Lewiston first.

Q. And what did you do then? [8]

A. They had some cars we didn't have any bills for and Mr. Shehan the conductor wanted to go back to the yard office so we cut off the engine and went back to the East Lewiston yard office.

Q. Did you finally leave East Lewiston with the same number of cars that you left Forbay?

A. Left Forbay with the same number.

Q. I mean did you then leave East Lewiston with the same number after you went back?

A. We went back with the engine.

Q. Just with the engine? A. Yes.

Q. Then you came back to Forbay and picked up your cars? A. Yes.

Q. And then went to Arrow Station?

A. We stopped at North Lapwai.

Q. What did you do at North Lapwai?

A. We had some switching work to do at the sawmill there.

Q. And did you pick up any cars there or leave off any? A. We set some out.

Q. How many, do you remember?

A. It was two or three.

Q. Then you left with the remaining part of your train? A. Yes.

(Testimony of David A. Livingstone.)

Q. And went to where? A. To Arrow. [9]

Q. Do you remember what time you arrived at Arrow Station?

A. It was about, probably 10:40 or 10:45.

Q. That was in the morning? A. Yes.

Q. What did you do at Arrow Station?

A. We picked up some empties.

Q. Do you remember how many?

A. On the storage track—no I don't remember.

Q. Did you leave any at Arrow? A. No.

Q. You just picked up cars?

A. We picked up cars and headed in the Stites branch and stopped at the depot to register.

Q. What position did you have on that train?

A. I was rear brakeman.

Q. And who was the signalman?

A. Do you mean flagman?

Q. Do you have a signalman or flagman?

A. No, sir.

Q. Who acts as flagman or signalman?

A. The rear brakeman when he is there.

Q. Who was the other rear brakeman?

A. There wasn't any, just one.

Q. Was Mr. Sanman the engineer?

A. No, Mr. Dunlap.

Q. Mr. Dunlap was the engineer?

A. Yes. [10]

Q. Where does he live?

A. Lewiston—no, Clarkston.

Q. At Clarkston? A. Yes.

Q. Who was the fireman?

(Testimony of David A. Livingstone.)

A. Mr. Tippett.

Q. Where does he live?

A. Asotin, Washington.

Q. Who was the other brakeman?

A. Mr. Hull.

Q. What was he known as, the front or rear brakeman?

A. The head brakeman.

Q. Who was the Conductor?

A. Mr. Feehan.

Q. Now, when you pulled into the station of Arrow do you remember about where the caboos was resting on the main track?

A. Yes, when we first stopped at Arrow to pick up—well, that track holds sixty cars, we stopped about 20 cars west of the west switch—the caboos was.

Q. Now, the west switch we speak of—I hand you plaintiff's exhibit 10 and ask you if the west switch you are talking about is shown in that picture?

A. That's it.

Q. That is what is known as the west switch?

A. Yes. [11]

Q. And this picture is taken from what direction to what direction?

A. From the east looking west down the river.

Q. You are familiar with the railroad track there, are you not?

A. Yes.

Q. And in looking west I will ask you how many curves are shown in the picture?

A. Two are shown, the second one faintly, the one way down here.

(Testimony of David A. Livingstone.)

Q. Is there a cliff to the north of that?

A. To the north of the second one?

Q. Yes.

A. Well, not very high, there is an embankment.

Q. But, there is an embankment?

A. Yes, this is the main bluff around this first one.

Q. Where from that west switch was the caboose when the collision occurred?

A. From the west switch?

Q. Yes.

A. It was about I think about fifteen cars east of the west switch—I would't say exactly—the engineer measured it.

Q. I hand you plaintiff's exhibit 7 and ask you if you are familiar with that photograph and where and from what direction it was taken?

A. From the west switch looking east up the river. [12]

Q. If we were to match exhibit 10 and 7 you would have about the railroad tracks?

A. Yes, you would.

Q. Particularly if you would put them in here close (indicating)?

A. That's right.

Q. This in number ten is west and in number 7 it is east (indicating)?

A. Yes.

Q. Now, in number 7 are shown two sets of tracks, will you explain to the jury what they are, which is the main line and which is the siding?

A. The one on the north, left of the picture is the main line and this is the siding (indicating).

(Testimony of David A. Livingstone.)

Q. On the main line do you see a train?

A. Yes.

Q. This (indicating) is the main line?

A. Yes.

Q. And in this picture the siding is to the south, it it? A. Yes.

Q. You are familiar with that? A. Yes.

Q. Now, tell the jury what kind of cars were in this string of cars that you had on the main line?

A. I don't remember exactly, we had several commercial or industrial cars on the head end, the hind part of the train, about 50 or 60 cars were log flats and we had [13] common flats.

Q. On the rear of the train forward were 50 or 60 logging cars? A. Yes.

Q. Tell us about how high a logging car is?

A. Oh, you mean above the rails?

Q. Yes—can you compare it with some other kind of car?

A. About 3½ feet, maybe, about that.

Q. Is it similar to what we call a flat car, in height? A. Yes.

Q. Does it have any distinguishing features as a logging car?

A. Yes, they have what they call bunkers—bunker flats for the logs, stakes and chains.

Q. Upright stakes?

A. On one side—they are up on one side.

Q. On one side of the car? A. Yes.

Q. Is that true on all cars, the stakes are on the same side on all cars? A. They are turned.

(Testimony of David A. Livingstone.)

Q. Sometimes on one side and simetimes on the other?

A. They are all turned one way or the other, but in one train they may be different so that they can unload from the hot or cold pond.

Q. How high are these stakes? [14]

A. They are about six feet above the deck of the cars.

Q. Now, do you remember the time of the accident? A. Yes.

Q. What time was it? A. It was 11:10.

Q. 11:10 a.m.?

A. It was that time when I looked at my watch and it happened maybe a minute or two before that—not over a couple of minutes.

Q. But it was approximately 11:10 a.m., when the collision occurred? A. Yes.

Q. Now, do you remember on that morning and previous to the time of the collision, some cars on the south siding? A. Yes.

Q. Tell the jury what kind of cars they were?

A. You mean the west end?

Q. Yes, on the west end, by that west switch?

A. There were several loads there; the local often sets cars out there when the N P Tracks were full.

Q. What kind of cars were they?

A. Mostly boxcars.

Q. Do you know how many?

A. I don't remember now.

Q. Do you know how far—we have stipulated

(Testimony of David A. Livingstone.)

on that—[15] would you say that it was approximately 250 feet from the west switch east to the rear of the west car on the siding?

Mr. McKevitt: We object to that as leading.

A. From the switch?

Q. To the end of the west car?

Mr. McKevitt: I have an objection that it is leading.

Mr. Shone: We stipulated on that.

The Court: That is true but the questions you are asking are somewhat leading. You can ask him how far it is without telling him.

Mr. Shone: We have stipulated on this.

Mr. McKevitt: Just a moment Mr. Shone, I am going to object to the use of the words we have stipulated this without specifying what the stipulation is. I don't want him to stipulate me out of court.

Mr. Shone: We will strike that question.

Q. About how many boxcars were there on the south side, west from the caboose on your train?

A. You mean where the caboose was struck?

Q. That's right.

A. There must have been six or eight cars approximately.

Q. On the south siding? A. Yes.

Q. They were west of the caboose?

A. Yes. [16]

Q. Do you know how far they were from the west switch, that would be the car farthest west?

A. Almost two car lengths in the clear.

(Testimony of David A. Livingstone.)

Q. Two car lengths from the switch?

A. No, from the clearance point, it would be a little over four cars from the switch.

Q. About four cars? A. Yes.

Q. Where were you immediately previous to the collision?

A. I was on the engine, I went to the depot—I just got off the engine and went into the depot to register.

Q. Where was the engine with reference to the station house? A. Right beside it.

Q. Right beside the station house?

A. Yes, exactly.

Q. Was there a station agent there that day?

A. Yes.

Q. Did you know him? A. Yes.

Q. Who was he? A. Mike Schroeder.

Q. Where, at the time of the collision, if you know, was W. R. Hull the other brakeman?

A. He was in the depot too.

Q. He was in the depot? A. Yes. [17]

Q. Other than Conductor Feehan was there any other member of the crew at the end of the train where the caboose was? A. No.

Q. Mr. Feehan was there in the caboose?

A. Yes.

Q. What was the engineer's first name?

A. Charles.

Q. Charles Dunlap? A. Yes.

Q. You have been over the road many times I assume? A. Yes.

(Testimony of David A. Livingstone.)

Q. In approaching the yard limit which is west of the west switch and running a train or riding on a train going east toward Arrow Station, and after you get into the yard limit can you see around the cliff that is shown in the one picture that was shown you?

Mr. Clements: Now, we object to that as incompetent, irrelevant and immaterial until it is shown where the man was. It would depend on his position, do you have him on the train or standing on the track, Mr. Shone?

Mr. Shone: He can walk up the track, or he can be in front of the train, on the front board.

Mr. Clements: Let him tell us where he was.

Q. Can you see around that curve? [18]

A. Not around it.

Q. Could you see the caboose and the train that you were on further to the west that the curve where the embankment is?

A. Further west than the curve?

Q. Yes.

A. Yes, there is on chance to see it, there is one place you can see it.

Mr. McKevitt: See what Mr. Witness?

A. See where our train was.

Q. As you approach, going east, as you come around the big curve with the embankment shown in the picture which I handed you, then when do you make another curve?

A. Around that big bluff in the picture.

Q. Yes.

(Testimony of David A. Livingstone.)

A. That's the last curve before the tangent where the passing track is.

Q. Is that known as a left curve to an engineer going east?

A. Going east it would be as you approach the west switch.

Q. As you proceed eastward is there what is known as a right hand curve?

A. Just before the switch yes, before you get to the switch.

Q. And then the track is straight?

A. Straight up almost to the east switch.

Q. While you were at the station did you have any knowledge that engine 6015 had left East Lewiston at 10:35? A. No, I did not. [19]

Q. Were you notified by anyone—strike that—

Mr. McKevitt: Counsel said, did this man have any knowledge that engine 6015 left East Lewiston at 10:35—there is no evidence here what time that left East Lewiston—

Mr. Shone: I will ask him.

Q. Do you know what time 6015 left East Lewiston? A. I don't exactly, no.

Q. Did you know that 6015 was a scheduled train?

Mr. McKevitt: We object to the form of that, it is suggestive that it was a scheduled train.

Q. Did you know that 6015 was a scheduled train that day?

Mr. McKevitt: We object to that if the Court, because Mr. Shone, by the form of that question

(Testimony of David A. Livingstone.)

is indicating that it was a scheduled train that day and there isn't any evidence to that effect, and the classification of this train is very important in this lawsuit.

Mr. Shone: I will show what it was at the time of the collision—that was an extra then, but I want to show.

The Court: Possibilities are that you better show it at the time you examine the witness——

Q. Do trains run on schedule from Lewiston East? A. Some trains, yes. [20]

Q. Are they daily trains? A. Yes.

Q. And are they freight trains?

A. Freight and passenger.

Q. What are the freight trains known as—numbers?

A. The only freight train east, scheduled, is number 622.

Q. Number 662 is a timetable train is it not?

A. Yes.

Q. And by time-table train we mean that it is marked on a timetable? A. Yes.

The Court: We will take a fifteen minute recess at this time:

September 29, 1952, 2:45 P.M.

Q. Mr. Livingstone, were you or were you not notified that extra 6015 was proceeding easterly toward Arrow Station on November 11, 1951?

A. No, we were not notified.

Q. By we, who do you mean?

(Testimony of David A. Livingstone.)

A. The whole crew, none of the crew so far as I know.

Q. That was the crew of engine 1648?

A. Yes.

Q. I will ask you if there is a block signal on that line?

A. Not between Lewiston and Arrow.

Q. Will you tell the jury what a block system is?

A. It is a system of block between stations to indicate [21] whether a train is in there or not, automatically.

Mr. McKevitt: I am going to object to any testimony with reference to block signals, their presence or absence for the reason and on the following grounds that it is a matter primarily for either state regulatory bodies or the National regulatory body—Interstate Commerce Commission, and there is no pleading here that we violated any State or National law in that regard.

The Court: There is nothing before the court now—I will take care of that on the next question.

Q. What day of the week was it?

A. Sunday.

Q. Did anyone—

Mr. McKevitt: Pardon, Mr. Shone—in view of your Honor's ruling, I move to strike the testimony of the witness to the effect that there was no block signal there as not being competent, relevant or material in this case, nor within the issues.

The Court: I will take the motion under advisement.

(Testimony of David A. Livingstone.)

Q. Did any member of the crew of engine 1648, on November 11, 1951, and at any time preceding the collision in question, place upon the rails west of the caboose one or more torpedoes?

Mr. McKevitt: That is objected to if your Honor please, on the ground that it is incompetent, irrelevant and immaterial. It only could go to the question that there had been a rule violation by the Company, and there is nothing in this complaint that the Northern Pacific violated any operating rule of the Company. That should have been pleaded.

Mr. Shone: We claim that it is pleaded in that it failed to give adequate warning and adequate signals.

The Court: He may answer.

A. As far as I know there were no torpedoes, of course, I was on the head end.

Q. If torpedoes had been place on the railroad tracks west of the caboose of your train could you hear them at the place where you were standing near the engine if they exploded?

Mr. McKevitt: The same objection to this line of testimony. It involves a rule violation of the company and no rule violation has been pleaded. I understand when you rely upon a rule violation then you must plead the violation and the rule so that we will know in advance what rule violation you rely upon. There are 12 separate subdivisions, if the Court please, charging us with 12 separate acts of negligence but in none of the 12 is there a charge

(Testimony of David A. Livingstone.)

that the defendant violated an operating rule by the result of which Mr. Mely met his death. [23]

Mr. Shone: We think it is covered, if your Honor please, by the allegation of negligence in furnishing Mr. Mely with a safe place to work and the failure to give him warning of any kind and also by the 11th subdivision; failure to place men, flares or signals to give warning of said obstruction on said tract, a reasonable distance from said obstruction.

Mr. McKevitt: That goes to the question of a rule violation and no rule has been pleaded. There are 997 operating rules which go to the operation of train in that division.

Mr. Shone: I hadn't finished—also subdivision 12 failure to protect train 1648 while it was in such obscure position as aforesaid and in failing to properly protect train 6015 from colliding therewith—

The Court: —I am wondering if this testimony shouldn't follow the introduction of the rule.

Mr. Shone: I am asking if the torpedoes were placed on there and I will place a witness on the stand and introduce the rule.

The Court: I will let him answer but it seems to me that we are getting the cart before the horse.

A. The question is whether I could have heard the torpedo?

Q. Yes. [24]

A. Well, I wouldn't say because if they had been down they would have been over a mile away from the depot and I might not have heard them around all those curves.

Mr. Shone: I think that's all.

(Testimony of David A. Livingstone.)

Cross-Examination

By Mr. McKevitt:

Q. Mr. Livingstone, you were subpoenaed by the plaintiff to appear here as a witness?

A. Yes, sir.

Q. And you also received instructions from your Railroad superiors to appear here?

A. Yes, sir.

Q. Eddie Feehan was in charge of your train, was he not? A. Yes, sir.

Q. He was in the caboose at the time of the collision? A. Yes, sir.

Q. And Eddie Feehan was killed was he not?

A. Yes, sir.

Q. Now, this accident happened November 11th, Armistice Day to be exact? A. Yes, sir.

Q. And a short time after the accident on November 11th, to be exact, on the 14th you gave a statement to a representative of the Northern Pacific Claims Department as to what knowledge you had of this accident?

A. That is correct. [25]

Q. And the statement was voluntarily given, was it not? A. Yes.

Q. You were not injured in the accident were you? A. No.

Q. Now, it is a fact that you departed from Lewiston, according to your recollection on November 14—from East Lewiston about 8:30 in the morning?

(Testimony of David A. Livingstone.)

A. There is probably more accurate that I could say now.

Q. Being a railroad man, you know that there are train registers that show the exact time, is that right?

A. That is right.

Q. And at Arrow you had a train of 85 cars, is that true?

A. I thought it was 86 but I am not sure now.

Q. We won't quarrel about one car more or less. I believe you said when you gave this information to the claim Department that you registered out at 11:15 a.m. That would refer to registering out of Arrow, is that correct?

A. Yes.

Q. Explain to the Court and jury what you mean by registering out, what do you do?

A. There is a train register at the register stations where we put the engine number and all that information such as time of arrival and departure.

Q. In other words, is it not a fact that 1684 was in the process of pulling out of Arrow at the time the collision occurred?

A. Yes, that's right. [26]

Q. You had registered?

A. Of course when I registered I allowed a few minutes to get back on the train and get in the clear of the P & L Bridge.

Q. You, of course, understand what it meant by "yard limits" do you not?

A. Yes, sir.

Q. Those yard limits are marked by Yard Limit boards, are they not?

A. Yes.

(Testimony of David A. Livingstone.)

Q. What is meant by yard limits?

A. It marks the limit of each end of the yard, it is a system of tracks within defined limits provided for the making up of trains; that is what the rule says.

Q. You, of course, from time to time are examined on the rule book, aren't you?

A. That's right.

Q. Mr. Shone has asked you something about placing torpedoes whether it was done by members of your crew and you stated that it wasn't?

A. Not to my knowledge.

Q. Do you know the reason it wasn't done—wasn't it because you were within yard limits?

Mr. Shone: We object on the ground that it is immaterial and not proper cross-examination if leading to any violation of the rules. [27]

The Court: The objection will be overruled in view of my permitting him to answer your question.

Q. The caboose, at the time of that collision, was how far within yard limits—how far east of the west board?

A. It would be maybe 70 cars, approximately, you could tell on the map exactly.

Q. It would be at least the length of the train, 70 cars, wouldn't it, that the caboose was east of the yard limit board, in other words, it was that much inside the yard limits?

A. Yes, I think you could say at least seventy cars.

Q. And isn't it a fact that when you are within

(Testimony of David A. Livingstone.)

yard limits there is no rule requirement of going back and flagging back——

Mr. Shone: ——just a moment, we object to that as not proper cross-examination.

Mr. McKevitt: That is just the point he went into.

The Court: He may answer.

Q. That is fact isn't it Mr. Livingstone, that when you are within yard limits you don't have to place torpedoes against an extra train?

Mr. Shone: Objected to as not proper cross-examination.

The Court: He may answer. [28]

A. Not against second class or inferior trains.

Q. And 6015 to your knowledge was characterized as an extra train, wasn't it? A. Yes.

Q. And being an extra train it is a second class or inferior train, isn't that true? A. Yes.

Mr. Shone: If the Court please, we object to this line of examination as not proper cross-examination, and we move to strike the answers to this character of examination.

The Court: The motion will be denied.

Q. To put it another way Mr. Livingstone, instead of that train being 6015 extra train, if that had been 314 the passenger train, under the instructions of Eddie Feehan, you boys would have back-flagged, would you not?

Mr. Shone: That is objected to us not proper cross-examination.

The Court: He may answer.

(Testimony of David A. Livingstone.)

Q. You would have gone back and flagged and put torpedoes out?

A. If we had been on their time, yes.

Q. Now, of course, Eddie Feehan was in charge of 1648? A. Yes.

Q. A very competent conductor was he not? [29]

A. Very good.

Q. If there had been any protection required against 6015 he would have been the man to instruct you to take care of it wouldn't he? A. Yes.

Mr. Shone: Objected to as incompetent, irrelevant and immaterial and a conclusion of the witness and not proper cross-examination.

The Court: He may answer.

A. If any protection had been necessary Eddie would have provided it because he knew I was the head end. We had work to do up there.

Mr. Shone: We now move the Court to strike the answer of the witness on the ground that it is a conclusion as to what Mr. Feehan would have done.

Mr. McKevitt: This is cross-examination he is your witness not mine.

Mr. Shone: I am submitting it to the Court.

The Court: I think it is immaterial.

Q. Now, in addition to the testimony that you are giving here and in addition to the statement you gave to the representative of the Claims Department, in the latter part of November you also testified as a witness in a joint hearing between the operating officials of the Northern Pacific and the representatives of the—Interstate Commerce Com-

(Testimony of David A. Livingstone.)

mission of the United States Government, didn't you? [30] A. Yes.

Q. Investigating this accident?

A. Yes, I did.

Q. And in that hearing before the I C C you testified substantially the same as you have here under cross-examination did you not?

Mr. Shone: We object to that as not proper cross-examination, calling for a conclusion and not the best evidence.

The Court: The objection will be sustained unless you want to show him his testimony.

Q. Do you recall at the hearing of the I C C and the operating officials—do you recall the date of that—was it November 23rd, or about that date.

Mr. Shone: We object on the ground that it is immaterial?

The Court: Sustained.

Mr. McKevitt: Very well.

Q. Now, Mr. Shone asked about the position of some box cars on the south track, that is the side track? A. Yes.

Q. The passing track, is that what you call it?

A. Yes.

Q. You stated that there were six or eight box cars west of the caboose, is that your testimony?

A. Between the caboose and where the caboose was struck and [31] the west end of the west box car was about six or eight cars.

Q. You used the term clearance point, do you remember using that? A. Yes.

(Testimony of David A. Livingstone.)

Q. Will you explain that to the Court and jury?

A. The point between the siding and the main line which is considered safe clearance between the two tracks.

Q. In other words the end of the cars—that string on the side tracks was such that a train moving on the main line track would not have struck it—that's what you mean, isn't it, by proper clearance? A. That's right.

Q. You say that you have ben over that run between North Lapwai and Arrow several times, is that your regular run?

A. It was for several years.

Q. You know a great deal about that situation down there, don't you? A. Yes, I think I do.

Q. Now, having in mind the position of this caboose and working westward about how much vision would an engineer on 6015 have of that caboose when it first came into his view?

A. When he first saw the caboose?

Q. When he could first see it?

A. When he could first see the caboose—he could see [32] most of the train before he could see the caboose.

Q. He could see most of 1684 before he could see the caboose?

A. That's right, because of that long curve.

Q. Standing on the main line track, that is, your train? A. Yes.

Q. How far would it be then when he could first get a glimpse across the curve?

(Testimony of David A. Livingstone.)

A. You could see from the yard limit to the cross-over there, I don't know how far it is, you can see on the map there.

Mr. McKevitt: Has this may been marked yet?

Mr. Shone: It has not.

Mr. McKevitt: I will have it marked.

May I have the witness come to the map?

The Court: Yes, you may.

Q. I call your attention to defendant's exhibit 22 marked for identification and will you step over here so the Jury can see what we are talking about. Now, are you familiar with the area depicted on that Map, Mr. Livingstone? A. Yes.

Q. Where is the main line?

A. Here (indicating)—this is the main line.

Q. That Heavy white mark? A. Yes.

Q. Where is Lewiston, on the map?

A. Down here ten miles.

Q. Where is Arrow? [33]

A. Here is the switch.

Q. It is shown on the map? A. Yes.

Q. At this point where you say he could have seen part of 1684 standing on the main line even before he could have seen the caboose is about where?

A. About at the yard limit and here is the yard limit sign, here.

Q. You are pointing now to a portion of the map the yard limit sign just below the figures 43.19 feet to point of collision, is that correct? A. Yes.

Q. That is where you say he could first see it?

(Testimony of David A. Livingstone.)

A. Yes, but I don't know whether it is correct—the map——

Q. We will show that the map is drawn to scale. Now, you point to the point on the map where he could see?

A. I would say that he could not see the caboose—here is the siding—the cars are in here and the caboose was obscured. He could see the train from here. The train was from here clear back up here and that's the part he could see—these log flats but not the caboose.

Q. Because of the cars on the siding?

A. He might have thought the cars were on the siding.

Q. He could have seen that long string of cars—it isn't [34] what he might have thought, but what he could have seen. A. Yes, sir.

Q. Where was 1684 headed for? A. Stites.

Q. Stites, Idaho. A. Yes.

Q. And it had to occupy the main line in order to reach its destination? A. Oh, yes.

Mr. McKevitt: That is all.

Redirect Examination

By Mr. Shone:

Q. Referring to plaintiff's exhibit 6 will you tell us where that picture was taken from and in what direction?

A. It was taken west of the west switch maybe twenty car lengths.

(Testimony of David A. Livingstone.)

Q. Was it taken at the curve with the embankment, looking east? A. At that high bluff.

Q. Looking east from the high bluff?

A. Yes.

Q. Can you see the station of Arrow in that picture?

Mr. McKevitt: The picture itself is the best evidence.

A. I can see where the junction is but I can't see the switch from there, no. [35]

Q. Can you see the railroad track?

A. See the Clearwater but not the P & L Branch.

Q. You can see the tracks?

A. The Clearwater branch, I can't see the tracks exactly?

Q. Is there a great deal of underbrush and trees in that vicinity?

A. Just what is in the picture.

Q. Is it from this position that you were testifying that you could see part of the train?

A. No, sir.

Q. It wasn't from here? A. No.

Q. Was it farther east? A. Farther west.

Q. He could see still further west?

A. He could see part of the train but not the caboose.

Q. But further west than where the cameraman was standing for this picture, exhibit 6?

A. Yes.

Q. He could see this train?

A. He could see all the middle of the train.

(Testimony of David A. Livingstone.)

Q. Did you go back there on that day?

A. Yes.

Q. With whom? [36]

A. I don't know the man's name.

Q. Was he an official of the Railroad Company?

A. No, he wasn't.

Mr. Shone: That is all.

Mr. McKevitt: No further questions, your Honor.

FRANK A. REISENBIGLER

called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Shone:

Q. Where do you live Mr. Reisenbigler?

A. Greenacres, Washington.

Q. Is that near Spokane? A. Yes, sir.

Q. Is it a suburb of Spokane? A. Yes, sir.

Q. What is your occupation?

A. Fireman for the Northern Pacific Railroad.

Q. How long have you been a fireman for the N. P. A. Since April 14, 1945.

Q. And have you followed that occupation continuously since?

A. Practically all of the time, yes, sir.

Q. On November 11, 1951, were you a fireman on a N. P. Engine? A. Yes.

Q. Out of Lewiston, Idaho? [37]

A. Yes, sir.

Q. What kind of an engine was that?

(Testimony of Frank A. Reisenbigler.)

A. Four unit diesel, 6000 horse I think it is supposed to be.

Q. What was the number of the first diesel unit, do you know?

A. The whole engine was 6015, the four units, the units are lettered A, B, and C and D.

Q. Were they in the reverse order, was D the lead unit? A. D, was the lead unit.

Q. Who was in D unit, the lead unit?

A. Mr. Mely, Mr. Brown and myself.

Q. What position did Mr. Mely hold with the Company at that time? A. Engineer.

Q. That was A. E. Mely? A. Yes, sir.

Q. And Mr. Brown?

A. He was a brakeman.

Q. What was his first name, do you know?

A. No, I don't remember.

Q. You were the fireman? A. Yes, sir.

Q. What time did you leave Lewiston that morning, if you did leave in the morning?

A. We were called for 10:20 as I recall.

Q. A.M.? A. Yes. [38]

Q. And before you were called for 10:20 a.m., what time were you called for?

A. That's the time we were called, to be on duty at 10:20.

Q. And if they hadn't called you for 10:20, when would you have gone to work?

Mr. McKevitt: That is immaterial, we object, it is entirely immaterial when he would have gone to work if he hadn't gone at 10:20.

(Testimony of Frank A. Reisenbigler.)

Q. That day?

The Court: I think it is immaterial, but I will let him answer.

A. Well, it was supposed to be 11:45 our schedule.

Q. What was your schedule to leave Lewiston on that day, November 11, 1951.

A. I don't get that.

Q. What was your regular schedule, your regular time.

A. We was running extra that day.

Q. Yes, I know, but what was your regular schedule if you weren't running extra?

Mr. McKevitt: We object, if the Court please, it is immaterial, he wasn't running on schedule, he said he was running extra.

Mr. Shone: That's right but I asked if he wasn't running extra what would his schedule have been. [39]

The Court: I think it is immaterial but I will let him answer, it probably will save time to let him answer.

A. If we were called for 11:45 we would have left Lewiston probably at 12 o'clock.

Q. That day you were called as an extra?

A. Yes, sir.

Q. Let me ask you Mr. Reisenbigler, were you not usually a regular train—a scheduled train?

Mr. McKevitt: We object to that as incompetent, irrelevant and immaterial.

(No ruling)

(Testimony of Frank A. Reisenbigler.)

A. No they don't always run schedule.

Q. No, but do you have a schedule.

A. Yes, sir, we have a schedule.

Q. And that schedule is to leave Lewiston at 12:30 isn't it?

Mr. McKevitt: What train.

Q. The time-table train 662?

Mr. McKevitt: We object to this—this your Honor, is a different train altogether.

The Court: I don't know where that train enters into this matter but he may answer.

Q. Is that correct? A. Yes, sir.

Q. On that day you were called earlier and what time did you leave Lewiston as an extra?

A. If I recall right, it was between 11 and 11:30.

Mr. McKevitt: You are talking about East Lewiston?

A. Yes, sir.

Q. When you left East Lewiston?

A. Yes, sir—no, it was about 10:35 as I recall.

Q. A.M. A. Yes.

Q. What kind of train did you have leaving East Lewiston.

A. We had no train, just a caboose.

Q. You had a diesel engine four units and just a caboose? A. That's right.

Q. And you went Eastward? A. Yes, sir.

Q. To what station? A. Forbay.

Q. What did you do at Forbay?

A. Nothing, we just passed through there.

Q. Then you came to Lapwai?

(Testimony of Frank A. Reisenbigler.)

A. Yes, sir.

Q. And what did you do at Lapwai?

A. Picked up 15 cars.

Mr. McKevitt: Do you mean North Lapwai?

A. Yes, sir

Q. You say you picked up 15 cars there?

A. Yes.

Q. What kind of cars? [41]

A. Freight cars.

Q. Box cars were they?

A. Yes, box cars.

Q. Loaded?

A. I wouldn't say but I think they were loaded.

Q. Do you know what they were loaded with?

A. I couldn't say, no.

Q. After picking up these fifteen cars you left Lapwai for Arrow station did you? A. Yes.

Q. On your way to Arrow Station tell the jury how you and Mr. Brown and Mr. Mely were arranged in the front diesel unit.

A. Mr. Mely was sitting on the right in his proper position, Mr. Brown was on the left, and I was on the left hand side in the fireman's seat.

Q. Tell the jury what kind of vision the engineer, fireman and head brakeman will get while sitting in the front unit of the diesel?

A. Good vision, just as far as you can see—a mighty good vision.

Q. What kind of glass have you there? Is there a glass?

(Testimony of Frank A. Reisenbigler.)

A. Yes—it is a very clear glass, you can see through it any time.

Q. How far does it extend across the unit in the front part? [42]

A. It is just like a windshield of a car, nothing to obstruct the view out the windshield.

Q. Is it bigger than an automobile windshield?

A. Yes, sir.

Q. Where is it situated—right in front of the unit? A. Yes, sir.

Q. Would all three of you look through this windshield at the same time? A. Yes, sir.

Q. And is it necessary to see ahead, that anyone put their head out to the side?

A. No, sir.

Q. You all keep within the unit?

A. Yes, sir.

Q. Do you have extended vision as the train proceeds eastward? A. Yes, sir.

Mr. Shone: May I show the witness some photographs?

The Court: Yes, you may.

Q. How long have you been running over that particular railroad track from East Lewiston to Arrow Junction in the State of Idaho?

A. Off and on at different times for the past seven years.

Q. And in the capacity of fireman?

A. Yes, sir. [43]

Q. Had you been firing for Engineer Mely for any length of time? A. No, sir.

(Testimony of Frank A. Reisenbigler.)

Q. How long?

A. Well, it's just that I caught him off the extra board, I would catch him off the extra board when his regular man is not with him.

Q. You had been with him at various times though? A. Yes, at various times.

Q. What kind of an engineer was he?

Mr. McKevitt: That is objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I considered him a good engineer.

Q. You considered him a careful engineer?

Mr. McKevitt: The same objection and it calls for a conclusion of the witness.

The Court: He may answer.

A. Yes, sir.

Q. I hand you Exhibit 1 and I will ask you to explain to the jury what you see in that picture in regard to the railroad track, and which direction you are looking? A. I am looking west.

Q. From what point? A. Toward Arrow.

Q. Do you know that big curve there? [44]

A. Yes, sir.

Q. With an embankment?

A. That's right.

Q. You are familiar with that embankment?

A. Yes, sir.

Q. That picture is taken west of the embankment—the photographer is standing west of the embankment? A. Yes.

Q. Facing east?

(Testimony of Frank A. Reisenbigler.)

Mr. McKevitt: I object to these questions they are all leading and suggestive your Honor.

The Court: Yes, your questions are leading, Mr. Shone.

Q. Now, as you approach that curve in an engine—a diesel engine, can you see the station of Arrow before rounding the curve?

A. No, sir, you can't, I don't think.

Q. When can you see the station of Arrow?

A. You would have to get about to the point of the curve, I think, if I recall it right—close to it.

Q. I hand you plaintiff's Exhibit 6 and I will ask you if you are familiar with the embankment there shown in the picture, to the left?

A. Yes, sir.

Q. Which way are you looking there?

A. You are looking east. [45]

Q. Can you see the station of Arrow in that picture?

A. No, you can't see the complete station.

Q. Handing you plaintiff's Exhibit 10 I will ask you if you know the topography of the country depicted in that photograph? A. Yes.

Q. And which way are you looking when you look at that photograph? A. West.

Q. Do you recognize the switch shown in the picture? A. Yes, sir.

Q. What is that known as?

A. That is the branch that turns off up the Clearwater River and the N.P.

Q. Is that known as the West or East switch?

(Testimony of Frank A. Reisenbigler.)

A. I don't recall as it is.

Q. Is that switch the farthest switch west from the station of Arrow? A. No.

Q. Is there one beyond the curve?

A. Yes, sir.

Q. Coming to the big curve and the embankment is that the last switch going west?

A. Yes—to the embankment.

Q. And that switch is for the purpose of what?

A. That is for the purpose of trains going up the Clearwater and going to Spokane.

Q. And is there a siding there?

A. There is above there.

Q. How far?

A. I couldn't say exactly but it is above the depot.

Q. Now, I hand you number 7 and ask you if you are familiar with the siding shown in Plaintiff's Exhibit 7? A. Yes, sir.

Q. Where is that siding with reference to the switch in the other picture you have?

A. That would have to be east of Arrow.

Q. East or West?

A. That would be east of Arrow?

Q. You come to that switch when you are traveling east before you come to Arrow?

A. I believe that is right, yes.

Q. You come to that switch when you are going east before you come to Arrow, traveling from Lewiston to Arrow?

(Testimony of Frank A. Reisenbigler.)

Mr. McKevitt: Do you understand that question?

A. I understand the question but I just can't place this siding.

Q. On November 11, 1951, as you were proceeding around the large curve with the embankment, and going east, could you see any cars ahead of you?

A. No, not ahead of us, there were cars in the siding we [47] could see.

Q. Where were those cars on the siding?

A. They would be on the right hand side of the main track.

Q. You are speaking of your right hand side traveling east? A. Yes.

Q. Would that be on the south side of the track going east? A. Yes, sir.

Q. Can you see the siding in those pictures?

A. Yes, sir.

Q. Is that the siding upon which these cars we are speaking of were standing? A. Yes, sir.

Q. And that switch, is that a switch leading into this particular siding upon which these cars were?

A. No, sir.

Q. You don't think so? A. No, sir.

Q. But you are sure that is the siding?

A. Yes, that is the siding.

Q. That is Exhibit 7? A. Yes, sir.

Q. In this Exhibit 7 which I am again handing you, do you see the main line? A. Yes, sir.

Q. That you were traveling on?

(Testimony of Frank A. Reisenbigler.)

A. Yes, sir. [48]

Q. What is on that main line?

A. Passenger train.

Q. As you approached the cars on the siding and you on the main line, what did you first observe?

A. The caboose—the back end of the caboose.

Q. Where did you observe it?

A. On the main line.

Q. Where did you see the caboose?

A. On the main line.

Q. Where was the diesel unit in which you were riding in regard to the caboose on the main line when you first observed it?

A. We were on the main line, too—the diesel unit was on the main line too.

Q. You were on the main line?

A. Yes, sir.

Q. And the caboose was on the main line?

A. Yes, sir.

Q. When you saw the caboose, how far were you from the caboose? A. I don't know.

Q. Where were you when you saw it?

Mr. McKevitt: We object to this, the witness has said that he doesn't know—now this is cross-examination of his own witness.

The Court: I think he may answer—just try to answer if you can. [49]

Q. Where were you when you first saw the caboose?

(Testimony of Frank A. Reisenbigler.)

A. We were on the engine and the engine on the main line.

Mr. McKevitt: Is he inquiring about the physical presence of this man?

The Court: That is the way I understand the question.

Q. And where was Mr. Brown?

A. In the center.

Q. And Mr. Mely? A. On the right.

Q. Whereabouts on the railroad track was the diesel unit when you first noticed the caboose, in regard to curves or straight away track?

Mr. McKevitt: Object to that as the witness has testified that he doesn't know how far he was or how far the diesel was from the caboose when he first saw it.

(No ruling.)

A. I don't know.

The Court: The answer may stand.

Q. You don't know. A. No, sir.

Q. What occurred among the three of you in the diesel engine in the way of an announcement?

A. I and Mr. Brown both hollered at the same time. [50]

Q. What did you holler?

A. Stop the train, and Mr. Mely jumped up and "dynamited" the train.

Q. Did you both holler at the same time?

A. Yes, sir.

Q. Did anybody holler "big hole it"?

(Testimony of Frank A. Reisenbigler.)

A. No.

Mr. McKevitt: Your answer was "no."

A. I hollered "stop the train."

Q. What did Mr. Brown holler?

A. I can't say but I think he hollered the same thing.

Q. What did Mr. Mely do?

A. Jumped up out of his seat and dynamited the train.

Q. He had been sitting down? A. Yes.

Q. And he jumped up? A. Yes.

Q. And dynamited the train? A. Yes, sir.

Q. Explain how he did that?

A. He jumped up out of his seat and grabbed the brake valve and threw it over in emergency position.

Q. Where was the brake valve from where Mr. Mely was sitting?

A. Practically right there—right by the side of his hand.

Q. He first jumped up? A. Yes, sir. [51]

Q. And he placed his hand on the brake valve?

A. Yes, sir.

Mr. McKevitt: I dislike to be objecting all the time but these are all leading questions.

The Court: They are somewhat leading, however this has been answered.

Q. Then tell us what occurred after he dynamited it?

A. Mr. Brown jumped for the door and he jumped out, and Mr. Mely said to me "let's jump."

(Testimony of Frank A. Reisenbigler.)

Mr. Mely made for the door and I did too. I was going to jump out the left side and I saw my door was sticking or something and I looked around and Mr. Mely had already jumped and I grabbed my door with both hands and gave it a yank and it came open just as we hit the caboose.

Q. Did Mr. Mely jump out? A. Yes, sir.

Q. And Mr. Brown jumped out?

A. Yes, Mr. Brown jumped first.

Q. Did you see Mr. Mely that day afterwards?

A. No, sir.

Q. Did you see Mr. Brown? A. No, sir.

Q. Do you know where they were found afterwards? A. No, sir.

Q. At the time Mr. Brown and Mr. Mely jumped was the train still dynamited? [51-A]

A. Yes, sir.

Q. And by dynamiting a train you mean what?

A. The brakes are set on all the cars.

Q. Were the brakes also set on the four units of the diesel?

A. No, sir, they don't set on those, I don't believe—I am not sure.

Q. Does the diesel free-wheel when the train is dynamited?

A. I am not sure but I think it does.

Q. The four units? A. I am not sure.

Q. Do you know whether it did on this occasion or not? A. No, I don't.

Q. As you were approaching this standing ca-

(Testimony of Frank A. Reisenbigler.)

boose and before Mely dynamited that train, how fast would you say you were traveling?

A. I won't say. I haven't any idea. I was in no position to even see the speedometer.

Q. You have been riding trains as a fireman for how many years? A. About seven.

Q. Are you able to formulate an average judgment about the speed of a train from your position in the unit?

Mr. McKevitt: Counsel is cross-examining his own witness, he says that he cannot see, and counsel apparently doesn't like that answer and he is—— [52]

The Court: Are you an unwilling witness here, do you want to testify as to what you know?

A. I want to testify to what I know and that is all I can say.

The Court: Yes,—go ahead.

Q. Now,——

A. ——I have had a lot more experience on steam engines than I have on diesel engines.

Q. You mean in regard to your knowledge of the speed of an engine? A. Yes, sir.

Q. How long had you been working on diesels?

A. I have been on diesels at different times ever since the N P got them. It isn't very often that we are on these diesels, it is generally steam for the extra men.

Q. With your knowledge of the diesels and your experience are you able to formulate an opinion as

(Testimony of Frank A. Reisenbigler.)

to the speed of that train immediately before it was dynamited? A. No, sir.

Q. You couldn't form an opinion?

A. No, sir.

Q. Was there anything unusual in the speed of that train that drew your attention to the speed?

A. No, sir.

Mr. McKevitt: We object to the form of that question—— [53]

The Court: He has answered.

Mr. McKevitt: I move that the answer be stricken and the jury instructed to disregard it?

The Court: The motion is denied.

Q. When your crew left East Lewiston were you notified or any member of your crew notified that extra 1648 had left Lewiston for Arrow station?

Mr. McKevitt: We object to that on the ground that there was no legal obligation on the part of the railroad to so notify them.

The Court: He may answer.

A. We received no notice that I recall.

Q. Was there a dispatcher at East Lewiston, a Northern Pacific dispatcher? A. Yes.

Q. And if notice was given would that be imparted to the conductor, engineer and fireman?

A. Yes, sir.

Q. Did you have train orders that morning?

A. Yes, sir.

Q. Did you read your train orders?

A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. Mr. Reisenbigler, do you know what your train orders were that morning?

A. I did at the time but I don't recall now.

Q. You did at the time? [54]

The Court: If those are the train orders that you have there you may show them to him to refresh his memory.

Q. I hand you book and ask you if this is your train order?

A. Yes, sir, if I recall right, that is it.

Mr. Shone: May I read this into the record and the the jury instead of putting it in evidence.

The Court: Yes, just read it into the record.

Mr. Shone: "Engine N P 6015, run extra, East Lewiston to Arrow; will not register at Spalding, number 661 has passed Spalding."

Q. What train was 661?

A. That was 661 coming west.

Q. According to your time schedule 661 is a west train and 662 is an east train?

A. That's right.

Q. That is time table train? A. Yes.

Q. At any time before the collision with train 1648, had you or your crew been notified that 1648 was at Arrow station or ahead of you?

A. No.

Q. You had not. A. No. [55]

Q. Now, as you came around the curve just west of this switch, you said that you saw some box cars on the south siding? A. Yes, sir.

Q. Could you, in coming around the curve, the

(Testimony of Frank A. Reisenbigler.)

first one, where the embankment is, could you see the cars or any of them,—any of the cars on 1648 on the main line? A. No, sir.

Q. Did anyone of your crew say anything in regard to their seeing that train at that time?

A. No, sir.

Q. Do you know where the train was, approximately, with regard to the west switch when you hollered “stop the train.” A. No, sir.

Q. Do you know how far you were from the caboose standing on the track when you hollered to Mely to stop the train? A. No, sir.

Q. Can you give us an approximate distance?

A. No, sir.

Q. You cannot. A. No, sir.

Q. Now there are no block signals on that system between east Lewiston and Arrow station?

Mr. McKevitt: We make the same objection that we heretofore made to this question. [56]

The Court: There is no contention here that there is a system of block signals in there?

Mr. McKevitt: No.

The Court: Then can you stipulate that there were no block signals there?

Mr. McKevitt: We will stipulate that there were none and it was not required?

The Court: Just that there were none.

Mr. Shone: That there were no block signals between East Lewiston and Arrow station.

Mr. McKevitt: That is correct.

(Testimony of Frank A. Reisenbigler.)

Mr. Shone: Then I won't take up any more of the Court's time with that.

Q. On Sunday, as was November 11, 1951, what was the usual work done at Arrow stations, if any?

A. We was to pick up some cars there, the way I understood it?

Q. You were to pick up some cars?

A. Yes, sir.

Q. What about other trains running east from Lewiston on Sunday, was it a working day?

A. No, sir.

Q. Tell the Jury in your own words the condition that you would expect as a fireman, running east, at Arrow station, on Sunday?

Mr. McKevitt: We object to that form of question,—what he would expect—— [57]

Q. As usual and customary then?

The Court: It is not a question of what he expected, but what condition existed, however, I will let him answer.

A. The only thing we figured on meeting was the passenger train 311, and they wasn't due for quite a while.

Q. Which way were they traveling?

A. West.

Q. Toward you, that is, in an opposite direction? A. Yes, sir.

Q. Why didn't you expect to meet another train going ahead of you in the same direction?

Mr. McKevitt: We object to this as argumentative.

(Testimony of Frank A. Reisenbigler.)

The Court: He may answer.

A. Well, sir, if there had been any other trains coming, we would have probably got orders at Arrow.

Mr. McKevitt: You mean coming against you.

A. Yes, coming against us.

Q. And how about a train ahead of you?

A. Depending on where they were, maybe we would have gotten some orders on them, too.

Q. You say you probably would have gotten some orders.

A. Yes, if they were to let us around them or something like that.

Q. You mean at Arrow station?

A. Yes, sir. [58]

Q. Up to the time of the collision you had no orders or warning? A. No, sir.

Q. As you approached the caboose standing on the main line, do you know whether or not any torpedoes had been placed on the rails west of the caboose?

Mr. McKevitt: The same objection to this line of testimony if your Honor please.

The Court: He may answer.

A. No, sir, I don't.

Q. Were there any torpedoes placed there?

A. I didn't hear any?

Q. Tell the jury what a torpedo is and what kind of a noise it makes when it goes off?

A. Well, it is a flat piece of metal that clamps on the rail and when the engine goes over it, it

(Testimony of Frank A. Reisenbigler.)

explodes like dynamite, like a big loud firecracker.

Q. And it is secured to the rail?

A. Yes, it clamps on the rail.

Q. And what is the purpose of a torpedo or two torpedoes on the rail?

A. It works as a caution, there may be someone ahead of you.

Q. And what does the engineer do when he hears these torpedoes go off?

A. He generally slows his train to restricted speed.

Q. Is it a duty of his to do that when he hears torpedoes go off under his train? [59]

A. Yes, sir.

Q. Does he bring it to a stop?

A. Not necessarily.

Q. Is it an indication of danger ahead?

A. Yes, sir.

Q. And is it one of the indications of danger which railroad engineers heed? A. Yes, sir.

Q. Indications of danger ahead?

A. Yes, sir.

Q. And do you heed those? A. Yes, sir.

Q. Is there any other warning that they put out in case of an obstruction ahead?

Mr. McKevitt: Is it understood that I may have a general objection to this line of questioning, your Honor?

The Court: Yes, you may.

Q. Such as fusees? A. Yes.

Q. Tell the jury what a fusee is?

(Testimony of Frank A. Reisenbigler.)

A. It is made up of a kind of powder they use, and it throws a red light, and they set them on the track.

Q. And how long does one of them burn?

A. Approximately ten minutes or so.

Q. And how do you put them on the track?

A. They have a spike they stick in the tie. [60]

Q. You light one end and stick it in the tie?

A. Yes, sir.

Q. You can throw it in the tie?

A. Yes, sir.

Q. Then if you come upon a fusee, as a fireman, moving in the direction that the fusee is burning,—can you tell by looking at a fusee about how far a moving train would be ahead of you, in time,—in minutes? A. No, sir.

Q. Not in time? A. No, sir.

Q. Well, assuming that you were moving eastward that was burned down half way—

Mr. Clements: Now, if the Court please, we object to this, it is in the form of a hypothetical question—

The Court: —Yes, it is assuming conditions that did not exist at this time and place.

Q. There were no fusees there this day, between your train and the caboose?

A. That is right.

Q. Now, at Arrow what was your crew going to do when you got into the station of Arrow?

A. We were to pick up some cars there as I understood it.

(Testimony of Frank A. Reisenbigler.)

Q. And where were those cars? [61]

A. They were in the siding, that would be west of the depot.

Q. West of the station? A. Yes.

Q. The cars that you were going to pick up would be west of the station of Arrow?

A. Yes, sir.

Q. Do you know how many you were going to pick up? A. No, sir.

Q. Where about would Engineer Mely have stopped his train if he was going to pick up these cars at Arrow station?

A. About at the depot?

Q. Had the track been cleared, of course?

A. Yes, about at the depot.

Q. Do you know how far the depot is from the west switch? A. No, sir.

Q. You don't know? A. No, sir.

Q. Did you know that the engine on the standing train, 1648, was at the depot when you saw the caboose just east of the switch? A. No, sir.

Q. You didn't know that? A. No, sir.

Q. At any time before you hollered "stop the train" or before Brakeman Brown hollered, had you seen this train or any part of this train 1648 on the main line track? [62] A. No, sir.

Q. Were you keeping a look-out?

A. Yes, sir.

Q. What was Mr. Mely doing?

A. We were all looking straight down the track.

(Testimony of Frank A. Reisenbigler.)

Q. All three of you? A. Yes, sir.

Q. And when you saw it you hollered?

A. Yes, sir.

Q. You hollered at the same time Mr. Brown hollered? A. Yes, sir.

Q. And Mr. Mely responded by dynamiting the train? A. Yes, sir.

Mr. Shone: I think that is all.

The Court: We will recess at this time until 10 o'clock tomorrow morning. Ladies and gentlemen of the Jury, I will ask you to remember the admonition I gave you at the first recess, I will not call this to your attention again during the trial.

September 30, 1953, 10 A.M.

Cross-Examination

By Mr. Clements:

Q. How long have you been employed by the Northern Pacific? A. Over seven years.

Q. And in what capacity?

A. Fireman. [63]

Q. And what is your place of residence?

A. Greenacres, Washington.

Q. And on November 10 and 11, 1951, where were you working out of? A. Spokane.

Q. That is where you picked up your equipment for the runs? A. Yes, sir.

Q. As I understand it you had ridden locomotive 6015 on November 10? A. Yes, sir.

Q. And you had brought that locomotive from

(Testimony of Frank A. Reisenbigler.)

Palouse, Washington? A. Yes, sir.

Q. By way of Arrow Junction?

A. Yes, sir.

Q. The day previous to the accident?

A. The accident was on November 11, Armistice Day? Yes, sir.

Q. Now, on your way to Lewiston, what time did you pass Arrow Junction on the 10th coming into Lewiston?

A. If I recall it would probably around one o'clock.

Q. What did you observe relative to any cars being on the siding?

A. I observed cars on the siding.

Q. In your direct examination you described 15 cars on the siding on the day of the accident, did you see those same 15 cars the night [64] before? A. Yes, sir.

Q. Now, when you come from Palouse to Lewiston, do you come on a considerable down grade?

A. Yes, sir.

Q. Let me ask, were these 15 cars in the same position as you had seen them? A. Yes, sir.

Q. Coming down the Kendrick grade did you make any test of your air equipment?

A. Tested the dynamic brakes and also make a speedometer check at that time.

Q. Now, there are four units in this diesel equipment, is there not? A. Yes, sir.

Q. And the equipment can be operated from either end? A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. Who is the boss or who is in charge of operating the locomotive equipment? Is it the fireman or the engineer? A. The engineer.

Q. And is his word final over the fireman?

A. Yes, sir.

Q. And the brakeman? A. Yes, sir.

Q. State whether or not there is a speedometer on both the A unit and the D unit of 6015?

A. Yes, sir. [65]

Q. What does that speedometer look like?

A. Well, it is a round glass a whole lot like a speedometer on a car.

Q. And it indicated the miles per hour by a needle, does it? A. Yes, sir.

Q. When it is in operation? A. Yes, sir.

Q. Now, is that equipment the same in Unit A and D unit? A. Yes, sir, just the same.

Q. You say that you made a test of that speedometer on your way into Lewiston that night?

A. Yes, sir.

Q. When did you make that test?

A. Right after we left Troy.

Q. How did you make it?

A. I went back to D unit and took the speedometer reading and took hold of the radio and called Mr. Mely and told him how many miles an hour we were going,—if I recall right it was about 25 miles an hour and he answered me back O.K.

Q. And that was the day before?

A. Yes, sir.

Q. Now, when the train is in operation, the

(Testimony of Frank A. Reisenbigler.)

only operators of the equipment is the one or ones on the front end, is that right?

A. Yes, sir. [66]

Q. And you say that the two units are equipped for intercommunication by radio?

A. Yes, sir.

Q. About what time did you get into Lewiston that night? A. Around 2 or 2:30.

Q. And you laid over until the next morning?

A. Yes, sir.

Q. Did you stay with Mr. Mely that night?

A. Stayed at the same hotel.

Q. You recall, of course, the next morning?

A. Yes, sir.

Q. Were you called as a member of the engine crew, any earlier than the train crew?

A. About 15 minutes, if I recall.

Q. Why are you called fifteen minutes earlier?

A. That fifteen minutes is to inspect our equipment before we start on the trip.

Q. Did you make any inspection of this equipment while you were at East Lewiston?

A. Yes, sir.

Q. What inspection did you make?

A. One of the duties of the fireman is to check the motors to see if they are all running perfectly, and the engineer generally walks around his train, —around the engine, and inspects his brake shoes to see that they are in place and such as that. [67]

Q. Did you notice Mr. Mely making that kind of an inspection? A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. Now, when you boarded the train or locomotive at East Lewiston, what did your train consist of at that time?

A. When we first got on it was just the locomotive.

Q. Did you later connect up any other equipment with it? A. We picked up the caboose.

Q. When you picked up the caboose who constituted your crew?

A. There were three brakemen, conductor, engineer and fireman.

Q. Who was the conductor?

A. Mr. Granger?

Q. Who were the brakemen?

A. Mr. Jewell, Mr. Ferris and Mr. Brown.

Q. Before you left the yard of East Lewiston did any other railroad employee make any inspection of the brakes of 6015 and the caboose that was then connected to it? A. Yes, sir.

Q. What kind of inspection was that?

A. Brake test.

Q. What do you mean by brake test?

A. By setting the automatic air on the engine, they have a pressure gauge in the caboose, to see how many pounds of pressure they receive in the caboose.

Q. After your full train is made up is that air pressure [68] indicated in the caboose?

A. Yes, sir.

Q. What did your equipment in the train consist of between East Lewiston and North Lapwai

(Testimony of Frank A. Reisenbigler.)

that morning? A. Engine and caboose.

Q. That is what you call, in railroad parlance, a caboose hop, isn't it? A. Yes, sir.

Q. That means that you connect the engine to a caboose for the purpose of going up to a later place or a further destination to make up the train, does it? A. Yes, sir.

Q. Did you hear any instructions or orders given Mr. Mely that morning as to any cars he should pick up on his trip? A. Yes, sir.

Q. What did you hear?

A. We was supposed to pick up cars at Lapwai and at Arrow.

Q. You mean North Lapwai?

A. Yes, sir.

Q. Now, about how far is North Lapwai, as you recall, from East Lewiston?—I think that is immaterial,—Now, what did you do when you got to North Lapwai,—did you pick up any cars?

A. Yes, sir.

Q. How many cars did you pick up? [69]

A. If I recall, it was fifteen.

Q. And the crew then working was the men that you have just named? A. Yes, sir.

Q. After you got your fifteen cars made up into your train were any tests made before you pulled out of East Lewiston of your braking equipment?

A. Yes, sir.

Q. What did that test consist of and who made it and how do you know it was made?

(Testimony of Frank A. Reisenbigler.)

A. By the exhaust from the brake valves and whistle for the air test.

Q. What do you mean,—who makes the whistle for the air test? A. The engineer.

Q. What does that indicate for the rest of the crew?

A. That he was going to set up the brakes.

Q. What do you mean “set up the brakes,” what does that term mean?

A. To use your independent brake lever and to draw off so many pounds of air, 12 pounds maybe, and maybe more.

Q. Is that a usual procedure in starting a train?

A. Yes, sir.

Q. Any train? A. Yes, sir.

Q. And that test was made in North Lapwai before pulling [70] out with your fifteen cars?

A. Yes, sir.

Q. From North Lapwai you proceed generally in the direction of Spalding, Idaho, don't you?

A. Yes, sir.

Q. Then are you required to cross Clearwater River on a railroad bridge? A. Yes, sir.

Q. Was any other brake application or further brake test made after you left North Lapwai?

A. Just before we came to the bridge.

Q. Is the bridge situated on the curve of the track? A. Yes, sir.

Q. And you made a brake test there?

A. Yes, sir.

(Testimony of Frank A. Reisenbigler.)

Q. After you got over the bridge did you notice Mr. Mely increasing his speed?

A. I think he did some, it seemed to pick up some speed.

Q. Now, what is your best judgment and recollection as to the distance from the time you get across the Spalding bridge until you come to Arrow, Idaho? Is it approximately a mile?

A. In that neighborhood, probably a mile or better.

Q. As you proceed from the east end of the Spalding bridge toward Arrow Junction are there any other signs,—any block signs along the right-of-way for the engineer's [71] direction?

A. There is a mile post sign, you have a sign indicating one mile to the station and you have the yard limit boards.

Q. You say there is a warning sign on the right-of-way? A. Yes, sir.

Q. Was it there in place that morning?

A. Yes, sir.

Q. And that is one mile this side of the yard board sign? A. Yes, sir.

Q. By the yard board sign you mean that is advising the engineer and the crew that it is the beginning of the yard limit? A. Yes, sir.

Q. How far is the warning sign from the yard board sign? How far this side of the yard board sign is the warning sign?

A. I would say it is in the neighborhood,—oh, it is not very far, I wouldn't say exactly.

(Testimony of Frank A. Reisenbigler.)

Q. What is the purpose of that sign?

A. To warn the crew that they are entering the yard limits.

Q. As you passed the warning sign that morning did you notice Engineer Mely decreasing his speed any? A. I did not.

Q. As you passed the yard board sign did you notice the engineer decreasing his speed any? [72]

A. I did not.

Q. Did you notice the engineer decreasing his speed any at any place after you crossed the Spalding bridge? A. No, sir.

Q. As a railroad man, and under the rules what did the yard board sign indicate to you and what are you supposed to do?

A. Drive at restricted speed, prepare to stop short of all objects.

Q. Is that the definition of restricted speed?

A. Yes, sir.

Q. Is that the definition or the substance of the definition as contained in the rule book?

A. That would be the substance of it.

Q. What do you say restricted speed means?

A. To stop short of all objects,—to be able to.

Q. Then there are yard board signs as you are going into the yard limits? A. Yes, sir.

Q. And the engineer, at that point, was supposed to be traveling on restricted speed?

A. Yes, sir.

Q. Was he traveling or was he operating on restricted speed that morning, on the morning of the 11th of November after he passed that sign? [73]

(Testimony of Frank A. Reisenbigler.)

Mr. Shone: To which we object as calling for a conclusion of the witness and invading the province of the jury.

The Court: It might be interesting to hear his answer because he said that he didn't know anything about the speed, when you were examining him, as I recall. He may answer.

A. Well, the only way I can answer that is this: I don't see how he could have been traveling at restricted speed.

The Court: The answer may be stricken in view of the objection.

Q. What would have happened to that train had he been traveling at restricted speed?

A. I think he could have stopped.

Q. You say that you don't have any idea as to the rate of speed he was traveling as he passed the yard board sign?

A. No, sir.

Q. Do you have any idea as to how far away the caboose was the first time you saw it?

A. No, sir, I don't.

Q. As I understand it, you did not experience any decrease in speed from the time he passed the yard board sign until the collision took place?

A. No, sir.

Q. What do you recall either you or Mr. Brown or Mr. Mely saying about cars ahead of you? [74]

A. There wasn't anything said about cars ahead of us.

Q. As I understood you in your direct examina-

(Testimony of Frank A. Reisenbigler.)

tion, you said that you and Mr. Brown yelled first, is that correct?

A. We did. We hollered when we saw the ca-
boose?

Q. Did Mr. Mely say anything?

A. Not at the present—he jumped up and ap-
plied the air brake.

Q. What do you mean that “he jumped up”?

A. Got up out of his seat.

Q. Was it necessary for him to do that?

A. No, sir.

Q. Was the air brake throttles and levers within
easy reach as he sat on his seat? A. Yes, sir.

Q. The engineer would be riding on the right
hand side of the cab in this diesel, would he not?

A. Yes, sir.

Q. How far would he have to reach out for this
lever for this braking application?

A. It is not very far, it is just real close,—just
about in that position to put your hand on the
brake lever (indicating).

Q. Then he could have just reached out with
his left hand for the operation of that lever?

A. That’s right. [75]

Q. Instead of that he jumped out of his seat on
this particular occasion? A. Yes, sir.

Q. And then the crash and collision occurred
shortly thereafter? A. Yes, sir.

Q. You heard someone telling Mr. Mely to pick
up cars at North Lapwai and Arrow, do you know
who told him that?

(Testimony of Frank A. Reisenbigler.)

A. I think it was Mr. Brown.

Q. The brakeman? A. Yes, sir.

Mr. Clements: I think that is all at this time.

Redirect Examination

By Mr. Shone:

Q. Mr. Reisenbigler, you are still an employee of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. And you are steadily employed?

A. Yes, sir.

Q. In and around Spokane, Washington?

A. Yes, sir.

Q. Tell the Jury at what station you last inspected the air brakes of your train before going into the Arrow station?

A. That was at North Lapwai. [76]

Q. And how far is that from Arrow?

A. It isn't over two or three miles.

Q. And that's about two or three miles west of Arrow station? A. Yes, sir.

Q. And at North Lapwai was your train at a dead halt for that inspection? A. Yes, sir.

Q. And from North Lapwai is it uphill to Arrow? A. Not very much.

Q. Is it upgrade? A. I couldn't say.

Q. Well, do you run it against the stream of the river? A. Yes, you do.

Q. And a river runs down hill doesn't it?

A. That's right.

(Testimony of Frank A. Reisenbigler.)

Q. So there is some upgrade from North Lapwai to Arrow? A. Yes, sir.

Q. And you had to travel about three miles to get to Arrow? A. Yes, sir.

Q. It's real close? A. Yes, it is.

Q. Of course, Mr. Reisenbigler, you were injured in this collision? A. Yes, sir.

Q. You did have a fracture of the skull?

A. Yes. [77]

Q. Do you still suffer from your injuries?

A. My skull fracture doesn't bother me any.

Q. Now, yesterday you mentioned that the only knowledge you had of a train was a number 611 coming toward you? A. Yes, sir.

Q. Where was 611 when you were at North Lapwai?

A. I don't recall just now where it was that we was supposed to meet them, where we figured on it.

Q. Had it gone by toward Lewiston?

A. No, sir.

Mr. McKevitt: I think it is 311.

The Court: I don't think you should interrupt Counsel in his examination, let him take care of it.

Mr. McKevitt: I am sorry, your Honor.

Q. 311, is that correct? A. Yes, sir.

Q. But you would not meet that train between North Lapwai and Arrow? A. No, sir.

Q. You are sure of that? A. Yes, sir.

Q. And that was the only train that you knew was on the track ahead of you? A. Yes, sir.

Q. And you knew exactly where that was?

(Testimony of Frank A. Reisenbigler.)

A. I don't recall. [78]

Mr. McKevitt: If the Court please, I am going to object, these are all leading questions,—Counsel forgets this is his witness.

The Court: Yes, but I am inclined to think that he is a very unwilling witness so far as the Plaintiff is concerned and a very willing witness so far as the defendant is concerned. You may cross-examine him.

Mr. Shone: I was about to ask permission to cross-examine him.

The Court: You may do so.

Q. Do you know what time 311 left Spokane, Washington?

Mr. McKevitt: Your Honor, for the purpose of the record may I make an observation at this time?

The Court: Yes, you may.

Mr. McKevitt: I object to counsel being permitted to cross-examine this witness for the reason and upon the ground that he has not claimed surprise so far as any testimony the witness has given and this witness was subpoenaed by this man here.

The Court. I can't help but observe that this witness answered all of your questions very readily in regard to speed and things of that kind and when counsel for the plaintiff was examining him he didn't know anything about speed,—he didn't know [79] how fast the train was running or anything at all about it but he has no hesitancy in testifying, under your cross-examination, everything in connection with it. I want to caution the jury

(Testimony of Frank A. Reisenbigler.)

not to pay any attention to my remarks to counsel. I will also withdraw the ruling of the Court that you may cross-examine the witness, Mr. Shone.

Mr. Shone: All right.

Q. Mr. Reisenbigler, did you have any knowledge of the time that 311 left Spokane, Washington? A. No, sir.

Q. Is it listed in the timetable?

A. Yes, sir.

Q. And were you familiar with that timetable on November 11, 1951?

A. Yes, I was at that time.

Q. If I showed you a timetable would you know what time it left Spokane?

A. Yes, sir, I would.

The Court: Just for the purpose of saving time,—I don't suppose that counsel will object to giving any information from that timetable.

Mr. Clements: Providing it is the right kind of timetable, there are several timetables in effect down there so far as the defendant's operation is concerned. [80]

The Court: I don't suppose I saved any time.

Mr. McKevitt: I understood that he wanted to show what time 311 left Spokane, Washington.

Mr. Shone: Will you agree on it?

The Court: We have taken up much more time now than if I had kept still,—I thought I could shorten this a little. Go ahead.

Q. What time did it leave Spokane? Mr. McKevitt will not agree.

(Testimony of Frank A. Reisenbigler.)

Mr. McKevitt: Sure we will agree, but I don't know what the materiality of this is.

The Court: You go ahead with your examination Mr. Shone, I apologize to you for interrupting.

Q. Handing you Plaintiff's Exhibit 23 I will ask you if that is a timetable dealing with passenger trains as well as freight trains?

A. Yes, sir.

Q. Will you look and see what time 311 left Spokane on November 11, 1951?

The Court: Is it there on the timetable?

A. Yes, sir, it was 9:10.

Q. In the morning? A. Yes.

Q. What time would it arrive at Arrow station? [81] A. 1:20.

Q. P.M. A. Yes, sir.

Q. After Engineer Mely put his train into emergency, was there anything else he could do to bring it to a stop? A. No, sir.

Mr. Shone: That's all.

Mr. Clements: That's all.

A. G. FERRIS

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Shone:

Q. Where do you live, Mr. Ferris?

A. Spokane, Washington.

Q. And are you an employee of the Northern

(Testimony of A. G. Ferris.)

Pacific Railway Company? A. I am.

Q. Presently employed by that company?

A. I am.

Q. And what is your occupation?

A. I am a conductor, but at the time I am employed as a brakeman.

Q. You have been a conductor for how long for that company?

A. I judge about two and a half years since I was promoted. [82]

Q. And brakeman? A. Since 1943.

Q. And how long have you been with the company? A. Since 1943.

Q. Were you ever on the run between Lewiston, Idaho, and Spokane, Washington?

A. Yes, sir, I was.

Q. What is that run called between Lewiston and Spokane? A. 661 and 662.

Q. 661 is coming down?

A. That is going west.

Q. Coming from Spokane to Lewiston?

A. Yes, that's right.

Q. And the train from Lewiston to Spokane is 662. A. That's right.

Q. Now, on November 11, 1951, you were operating a diesel four-unit, were you?

A. I was braking on the highball that day.

Q. What they call the highball?

A. Yes, sir.

Q. That is a scheduled train, is it?

A. A timecard train.

(Testimony of A. G. Ferris.)

Q. And the numbers on the units were 6015 A B C and D? A. Yes, it was extra 6015.

Q. And the D unit was where?

A. D was the east unit. [83]

Q. The front unit of the train?

A. Yes, sir.

Q. Where were you stationed?

A. At what point on the railroad?

Q. As you proceeded toward the station of Arrow?

A. Between North Lapwai and Arrow I was on the west unit of the diesel?

Q. That would be in the A unit? A. Yes.

Q. Now did the train stop at North Lapwai?

A. That's right.

Q. And for what purpose?

A. To pick up some cars.

Q. And after you picked up the cars did Engineer Mely make an inspection of the air brakes?

A. He set the air and the train crew made the inspection.

Q. But he also aids in the inspection?

A. He sets the air.

Q. It is one of his duties? A. Yes, sir.

Q. And was he the type of man that followed out his duties in that respect?

A. Yes, he did.

Q. Before leaving East Lewiston, Idaho, did he make his usual air test?

A. That is performed by the employees that are on duty there. [84]

(Testimony of A. G. Ferris.)

Q. And he also makes an inspection of the engine?

A. He inspects the engine before he takes it off the round-house track.

Q. You worked with him how long?

A. We didn't work steadily,—that is the first trip that Mr. Mely made on the highball for quite some time, as I understand it.

Q. But you had worked with him before?

A. I had worked with him on the main line, of course.

Q. And was he the type of man who always made his inspections regularly?

A. In my estimation Al was a good engineer.

Q. And you also did the same thing as a brakeman?

A. How do you mean?

Q. You assisted him in making the inspections?

A. Yes, that's true.

Q. After leaving North Lapwai you proceeded toward the station of Arrow?

A. That's right.

Q. And do you know what speed the train was traveling at?

A. No, I do not.

Q. What is your best estimate?

Mr. McKevitt: This is cross-examination of his own witness and it is objected to.

The Court: He may answer that.

A. You want my estimate? [85]

Q. Yes.

Mr. McKevitt: At what point, Mr. Shone.

(Testimony of A. G. Ferris.)

Q. Proceeding from North Lapwai toward the station of Arrow?

A. That's too indefinite, I cannot answer that.

Q. Well, you were at a dead stop at North Lapwai? A. That's right.

Q. Was it necessary that you put on speed in order to go ahead? A. That's true.

Q. And it took time to pick up speed?

A. That's true.

Q. And it is an uphill grade?

A. I don't know what the grade is there.

Q. But it is an upgrade?

A. I don't know.

Q. The river flows toward Lewiston, doesn't it?

A. Yes, sir.

Q. So that is down grade?

A. Necessarily, but that doesn't mean that the railroad grade is down.

Q. But you were going upgrade from Lewiston? A. I don't know the track elevation.

Q. It was necessary for Mr. Mely to pick up some speed to take this train to Arrow?

A. Yes, sir. [86]

Q. Were you to pick up cars at Arrow?

A. Yes, sir.

Q. Was there anything unusual in the speed of the train that you noticed?

A. Not that I noticed, or was conscious of, no, sir.

Q. And you were in the fourth unit?

A. Yes, sir.

(Testimony of A. G. Ferris.)

Q. Was there a speedometer in the fourth unit?

A. That's right, there was.

Q. And a speedometer in the unit Mr. Mely was operating?

A. That's right.

Q. And at the time you looked at the speedometer was there any excessive speed?

A. I never observed the speedometer.

Mr. McKevitt: We object to the form of the question, the term excessive speed.

The Court: He is a railroad man, he would know.

Mr. McKevitt: What I am talking about is this, he made the observation excessive speed; under company rules excessive speed at times could be ten miles an hour or could be five miles an hour, and again outside of yard limits, as the rules will show, that type of train could travel at a maximum speed of 30 miles an hour. [87]

The Court: But the rules wouldn't show how fast this train was traveling.

Mr. McKevitt: But he is talking about excessive speed and I don't know what rate of speed he means.

The Court: There is nothing before the Court as he has answered the question.

Q. Were you aware of anything wrong until the collision occurred?

A. My first intimation of anything unusual was when the air went into emergency.

Q. When the train is placed in emergency you would notice that?

A. You hear it.

(Testimony of A. G. Ferris.)

Q. Do you know about where it was when it was placed in emergency? A. No, I do not.

Q. When it is placed in emergency is that something that causes excitement with the crew?

A. Not necessarily.

Q. Did it with you on that occasion?

A. No, sir.

Q. From the fourth unit do you keep a lookout?

A. I had turned the fireman's chair around and was headed east.

Q. You were headed east?

A. I was facing east. [88]

Q. From that fourth unit can you see ahead?

A. It is possible, however, you would have to hang out the window quite a ways.

Q. Your window is not extended out, but is flush with the car?

A. No, it isn't, it is flush with the whole train.

Q. Do you keep your head out of the window so you can see ahead?

A. Ordinarily, the head brakeman rides the operating unit but in this particular instance being as how there is only three seats in each operating unit cab, they were fully occupied by Engineer Mely, Brakeman Brown and Fireman Reisenbigler so I dropped back to the fourth unit and was riding there.

Q. After the collision occurred did you see Engineer Mely? A. I did.

Q. Where was he, just tell the jury?

A. To the best of my remembrance now, he was

(Testimony of A. G. Ferris.)

just about midway of the second unit of the diesel, lying face downward between the main line and the passing track, more on the main line than the passing track, what I mean is that the rails had been shoved over if I remember correctly.

Q. And he was opposite the second diesel unit of his own train? [89] A. That is true.

Q. Do you know whether he had jumped out or had been knocked out by the collision?

A. I don't know—he was lying there, that's all I know.

Q. And the train, at that time, when you saw Mr. Mely, was at a stop? A. That's true.

Q. How far would that be from his position on the train, where you saw the body?

A. As I understand it these units on a diesel are about 50 or 52 feet, I am not sure, but he was about in a midway position of the second unit of the 6015.

Q. He was found in the wreckage?

A. I found him there, yes.

Q. And was he alive? A. No.

Q. He was dead when you found him?

A. He was dead.

Q. Have you ever ridden up in the front of a diesel while Mr. Mely was the Engineer?

A. I have.

Q. What have you observed as to whether he was a cautious Engineer?

Mr. McKevitt: We object to that, your Honor, it is not what the general reputation was but what was his conduct there on that day. There is no

(Testimony of A. G. Ferris.)

contention [90] here that this man was a bad engineer.

The Court: He has already testified that he was a good engineer.

Mr. McKeivitt: Certainly he was a good engineer.

Mr. Shone: You say he was.

Mr. McKeivitt: If he wasn't a good engineer they wouldn't have him on the Northern Pacific.

Q. The cars that you picked up at North Lapwai were loaded cars? A. Yes, as I understand it.

Q. And you were to pick up cars at Arrow?

A. That's right.

Q. As you approached Arrow and before the collision occurred, were there, to your knowledge, any torpedoes exploded on the rails?

A. Not to my knowledge.

Mr. McKeivitt: May we have the same objection we made to this question before, for the purpose of the record?

The Court: Yes, and he may answer.

Q. If there were torpedoes on the train were you in a position to hear them?

A. I would undoubtedly have heard them, yes.

Mr. Shone: That will be all.

Cross-Examination

By Mr. McKeivitt: [91]

Q. Mr. Ferris, you are now a conductor?

A. I am working as a brakeman right now, however I am promoted to a conductor.

(Testimony of A. G. Ferris.)

Q. That is by virtue of seniority rules is it?

A. And examination, yes, sir.

Q. Now, on this day in question, immediately prior to the collision, you were riding in what unit?

A. The hind unit, let me clarify that—that is hearsay on my part that I was riding in the A unit because we don't pay any attention to whether the D unit or the A unit is ahead, but I understand that it is in the record that the D unit was the lead unit that day.

Q. You were riding in the last unit?

A. That's right.

Q. What was your position, were you sitting down? A. Yes, sir.

Q. Which way were you facing? A. East.

Q. Facing the direction the train was going?

A. That's right, sir.

Q. Did you have any duties to perform at that time?

A. Well, I observed when we left North Lapwai, whether or not we had sticking brakes or maybe we left a hand brake on or something like that, and I observed those things.

Q. I observed when Mr. Shone asked you with reference to what the engineer did at North Lapwai, you said that [92] the engineer doesn't make the inspection, that the crew makes them, is that true?

A. That is true.

Q. There were fifteen loads in that train, wasn't there? A. Yes, sir.

(Testimony of A. G. Ferris.)

Q. And there were three brakemen to make the inspection? A. That's right.

Q. And what did the inspection consist of?

A. At North Lapwai that particular day after we had picked up the cars off the passing track and came back on to the main line and backed to the caboose, why, engineer Mely whistled the air, which consists of one long blast——

Q. You say engineer Mely whistled the air; explain to us what that means?

A. When the cars are charged, in other words, when the main reservoirs are charged he can tell on his air guages on his engine and he sets the air and gets the exhaust from this automatic brake valve and sees that he is drawing air off the train line and then he whistles the air and then we observe whether or not the pistons are extended and whether or not the brakes are setting up.

Q. Is it correct to say that what you have to do is, before you start, you cut the air through the entire train?

A. That's right, however, them cars, as I understand it, were set up the evening before, and as I remember it, [93] brakeman Jewell made one air joint on the cut of cars that we picked up at North Lapwai.

Q. When you left North Lapwai, was that train connected up in proper running condition?

A. Yes, sir.

Q. So far as air and couplers and everything was concerned?

(Testimony of A. G. Ferris.)

A. We would not have gotten a release from the caboose had there not been air in the train line and had the brakes not been set up.

Q. Then your answer is that when it left North Lapwai it was in proper operating condition in accordance with the rules?

A. That is right, to the best of my knowledge.

Q. How many times have you been over this area on this line prior to the 11th of November, 1951?

A. I couldn't tell you exactly but I have been over it quite a number of times.

Q. By the way, you were subpoenaed here by the plaintiff?

A. Yes.

Q. To appear here as a witness?

A. Yes, sir.

Q. Did you discuss this case with counsel for the plaintiff?

A. I talked to him, yes, sir.

Q. Which is perfectly proper.

A. Surely.

Q. You were also instructed by the railroad company to appear here? [94]

A. I was.

Q. Mr. Ferris, what kind of a train was this—was it an extra train?

A. Yes, it was.

Q. What do you mean by an extra train?

A. A non-scheduled train.

Q. A train that is not running on schedule?

A. That's true, not a timecard train.

Q. Not a timecard train?

A. Not on a timetable.

(Testimony of A. G. Ferris.)

Q. I am glad you said that because you referred to 661 and 662 as being timecard trains.

A. That is true.

Q. This was not a timecard train?

A. This was extra 6015.

Q. With reference to this torpedo question that Mr. Shone discussed with you. Do you know what type of train that was that this 6015 ran into?

A. We called it the Stites Logger, but it was an extra train as I understand it.

Q. It was an extra train? A. Yes.

Q. This accident occurred within yard limits did it not? A. It did.

Q. You have been examined on the rules, have you not?

A. I have, September 11, 1952, was the last time I took [95] the rules examination.

Q. Was there any requirement under the rules in effect on November 11, 1951, that required the conductor in charge of 1648 to either put out torpedoes, fusees or send out a flagman?

Mr. Shone: Just a moment, we object to that on the ground that it calls for a conclusion of the witness and invades the province of the jury, eventually the jury will be the one who will determine the duty of the crew of 1648 and also of 6015.

The Court: That is correct and the rules would be the best evidence.

Mr. McKevitt: If I may make this observation, Mr. Shone asked about the torpedoes, now, the only crew that would put out the torpedoes would be the

(Testimony of A. G. Ferris.)

crew of 1648, the train that was at Arrow. There would be no reason for asking about the torpedoes unless he is going to contend that it was the duty of someone on 1648 to put out the torpedoes.

The Court: That is not the question you asked—you asked if there was anything in the rules, and the rules would be the best evidence as to that. That would be a question for the jury later. I think you should put in the rules and not ask him what is contained in the rules. The rules themselves would be the best evidence. [96]

Mr. McKevitt: I see now, your Honor, how absolutely correct you are.

Mr. McKevitt: Do you agree that exhibit marked 24 for identification is the same as the one Judge Hyatt has?

Mr. Shone: It is not the same book but it is the same edition and is the operating rules that these men were operating under on November 11, 1951, we will agree on that, but not as to the materiality of these rules at this time. We agree that these are the rules and you need make no further showing on that.

Mr. Clements: And may it be admitted in evidence, on the basis of your statement.

Mr. Shone: I am going to object to its being admitted in evidence at this time.

The Court: We are just taking up a lot of time here, there is nothing for the Court to rule on. You have in your hand an exhibit which is admitted by Mr. Shone to be the rules controlling the opera-

(Testimony of A. G. Ferris.)

tions, now is there a rule in that book which had to do with extra 6015 on that date?

Mr. Shone: Objected to as not proper cross-examination.

Q. Mr. Ferris, was train 6015, on November 11, 1951, such a train that had to be operated at restricted speed [97] within yard limits?

Mr. Shone: We object to that as calling for the conclusion of the witness.

The Court: I think the objection is well taken, but he is a railroad man and in the interest of time I will let him answer.

A. It was an extra train, yes, it operated at restricted speed.

Q. It was required to be operated at restricted speeds?

A. That is true, according to the rules.

Q. What is meant by restricted speed?

A. Prepared to stop short of any obstruction.

Mr. McKevitt: That's all.

Redirect Examination

By Mr. Shone:

Q. In your opinion, at the time that the train was put into emergency was it being operated at restricted speed?

A. That I cannot answer.

Q. You cannot answer? A. That is right.

Q. Was it then being operated at what you would consider the usual speed along that line?

(Testimony of A. G. Ferris.)

Mr. McKevitt: Object to that, "the usual speed" is too indefinite a term.

The Court: I take it that the man who [98] was operating the train is dead, and he is presumed to have been operating it in a careful manner in accordance with the proper manner of handling trains and anything this man said would just be a guess on his part.

Mr. Shone: That is all.

Recross-Examination

By Mr. McKevitt:

Q. If that train had been operated at restricted speed within the yard limits at that time, it is a fact is it not, that there would not have been a collision?

Mr. Shone: We object to that as calling for a conclusion of the witness and invading the province of the jury.

The Court: In view of his former answer I will sustain the objection.

Mr. McKevitt: I would like to make an offer of proof outside the presence of the jury on cross-examination, as to what the witness would testify to.

The Court: I am about to recess anyway so the jury may retire.

Mr. McKevitt: The defendant offers to prove by cross-examination of this witness that if immediately prior to the collision in question, train 6015 operated by engineer Mely—if it had been operated at restricted speed under the rules of the company,

this collision would not have occurred. [99] It is already in evidence from plaintiff's own witnesses that this accident occurred within yard limits, and it is in evidence from plaintiff's own witnesses that within yard limits, a train must be operated at restricted speed and it is in evidence from the plaintiff's own witnesses that restricted speed means that the engineer must have such control of the train that he must be prepared to stop short of a train or any obstruction that may require the speed of the train to be reduced. It is our position that the question is proper and that this witness, if permitted to testify, he would testify, and would have to testify that if this train was operated at restricted speed that the collision would not have occurred.

Mr. Shone: We object to the offer of proof on the ground and for the reason that it calls for a conclusion of the witness and invades the province of the jury in deciding the ultimate question of fact to be decided in this case. We object to the statement and the offer of proof of what restricted speed is for the reason that the rule, which he has now read in his offer of proof, is not a statement of any particular speed as being restricted speed, no maximum speed is set forth either in the offer of proof or in the rule. Another ground; that the rules are not binding on the court or jury and in a final analysis of this case [100] it would rest upon the question of what a reasonable person would do under the same or similar circumstances, or what a reasonable person would not do under the same or similar circumstances.

The Court: This might be proper evidence in your case in chief, but I don't consider it proper cross-examination at this time. I am not ruling that he can't put that evidence in, but I am ruling that the testimony is not proper cross-examination, and the other I will rule on later if I have to.

Mr. Shone: We are going to base our case on a rule and when the proper time comes we will introduce the rule in evidence, and the defendants in their case may introduce any rule they wish, if proper.

Mr. McKevitt: He may offer some rule but if it is admitted it will be over my objection because he hasn't pleaded any rule violation.

The Court: We will recess for fifteen minutes at this time.

September 30, 1952—11:45 A.M.

Mr. McKevitt: No further cross.

Mr. Shone: That is all.

F. A. GRANGER

called as a witness by the plaintiff, after being first duly sworn testifies as follows: [101]

Direct Examination

By Mr. Shone:

Q. Where do you live, Mr. Granger?

A. Spokane, Washington.

Q. And your occupation?

A. Conductor on the Northern Pacific Railroad.

Q. And how long have you been working for the Northern Pacific Railroad?

(Testimony of F. A. Granger.)

A. Since 1910.

Q. You have had other positions than conductor, I presume?

A. I was a brakeman until 1917.

Q. Where were you working on November 11, 1951?

A. I was working on numbers 661 and 662 out of Spokane to Lewiston.

Q. And 661 is from Spokane to Lewiston, and 662 is from Lewiston to Spokane?

A. 662 is from Lewiston to Spokane, yes, sir.

Q. It is the same train but they change numbers; coming down it is 661 and going back it is 662?

A. Yes, sir.

Q. And the diesel engine you were working on was what? A. 6015.

Q. It had four units? A. It did.

Q. Now, you left East Lewiston, with the four units and caboose? A. Yes, sir. [102]

The Court: Gentlemen, just in the interest of time, I take it from what I have heard so far that everyone can stipulate that this train was mechanically perfect; in perfect running order and was properly inspected and it would be just a repetition in going over this train again up to the scene of the accident. Is that correct?

Mr. Shone: That is correct.

Mr. McKevitt: That is right.

The Court: If we can have that understood we can save a great deal of time, because there has been a great deal of evidence here concerning this train

(Testimony of F. A. Granger.)

prior to the time it arrived at the scene of the accident and there seems to be no dispute as to the condition of the train.

Mr. McKevitt: We will not pursue the question of the equipment or the condition of the brakes or anything of that nature, since it is admitted that there was nothing in dispute here.

The Court: I think we can go further with the stipulation, from what has been said by counsel we can stipulate that all the operators of the train were qualified, all the conductors and brakemen and others were properly qualified for the positions they were handling.

Mr. Shone: That is agreeable with us. [103]

Mr. McKevitt: And in addition to what has been said by his Honor, you will agree that Mr. Mely, on the day in question was thoroughly familiar with the operating rules as set out in the rule book.

Mr. Shone: We have already agreed to that.

The Court: Now, that has shortened this trial a great deal.

Q. Mr. Granger, when you left North Lapwai, did you have any orders to pick up cars at any other station?

A. At the Camas Prairie side track at Arrow, and the Northern Pacific track at Arrow.

Q. Siding tracks were they?

A. No, the one there is a storage track in the N. P. yard and the other is a side track on the Camas Prairie.

(Testimony of F. A. Granger.)

Q. One is called a side track and the other a storage track? A. Yes, sir.

Q. Do you know where the west switch is at Arrow? A. Yes, sir.

Q. And where in regard to the cars that you were going to pick up was the west switch?

A. The cars were at least three car lengths in the clear on the passing track.

Q. On that siding, is that a siding which is on the south of the track? A. Yes, sir.

Q. And how many cars were on that siding?

A. Fifteen cars. [104]

Q. Were you going to pick up those fifteen cars in your train? A. Yes, sir.

Q. And then you were to move from there up to the station and on the storage track pick up some other cars? A. Yes, sir.

Q. And you had orders to that effect?

A. Yes, sir.

Q. And where were your stations on this train before it reached the station of Arrow?

A. In the caboose, at my desk.

Q. And in the caboose, tell us if there is any instrumentality in the caboose giving you control over the train? A. Yes, sir.

Q. What is it? A. Emergency air brake.

Q. And with that emergency air brake you could stop the train? A. Yes, sir.

Mr. McKeivitt: We object to this line of testimony because there is no charge in this complaint

(Testimony of F. A. Granger.)

that the man in charge of that train—that this man here was in anyway negligent.

Mr. Shone: We are not claiming that at all, the fact is just the opposite.

The Court: I can't see where this has [105] anything to do with this case.

Mr. Shone: Merely on speed, your Honor?

The Court: Go ahead, his answer is in the record.

Q. As you proceeded toward Arrow Station from North Lapwai, were you in the caboose at all times?

A. Yes, sir.

Q. What first directed your attention to anything being abnormal with your train?

A. When he dynamited the train.

Q. Who is "he"?

A. The engineer.

Q. You never did dynamite that train?

A. No, sir.

Q. That was engineer Mely?

A. Yes, sir.

Q. Where was it that he dynamited the train?

A. I think it was a little east of the west switch.

Q. When he dynamited the train, was there any other thing he could have done to bring it to a stop?

A. No, sir.

Q. Dynamiting it was all?

A. Yes, that is all.

Q. As you approached the west switch, was there anything unusual in the speed of your train? [106]

Mr. McKevitt: Object to the form of that question as leading and suggestive.

The Court: It is leading.

Q. Was there anything unusual as to the speed of the train?

(Testimony of F. A. Granger.)

Mr. McKevitt: The same objection, your Honor.

The Court: Yes—just ask him what the speed was.

Q. Do you know what the speed was?

A. Only what I heard.

Q. Of your own knowledge? A. No, sir.

Q. You have no knowledge of that?

A. No, sir.

Q. Do you have a speedometer in the caboose?

A. No, sir.

Q. As to the speed that would be for you to determine as of your own opinion? A. Yes.

Q. As conductor of the train? A. Yes.

Q. Did you have an opinion at that time?

A. I did.

Q. That is, before the emergency brake was applied? A. Yes.

Q. Is there any way that you could look out of the caboose? [107]

A. Only looking out the window and then you are looking far across, away from the train.

Q. Do you usually keep a lookout?

A. Yes, sir.

Q. You have other duties to attend to as a conductor? A. Yes, sir.

Q. And you are in charge of the train?

A. Yes, sir.

Q. You are ahead of the engineer on the train?

A. Yes, sir.

Q. Did you see Engineer Mely after the wreck?

A. Yes, sir.

(Testimony of F. A. Granger.)

Q. Where was he?

A. He was lying at the rear end of the rear diesel.

Q. That was in among the wreckage?

A. He was in between the wreckage, he wasn't in it.

Q. Was he alive or dead when you saw him?

A. He was dead when I saw him.

Q. Where was Brakeman Brown?

A. He was about eight cars west of Mr. Mely.

Q. Did you see him? A. Yes, sir.

Q. Was he alive or dead?

A. He was alive.

Q. He died afterward? A. Yes, sir. [108]

Mr. Shone: That is all.

Cross-Examination

By Mr. McKevitt:

Q. Just a few questions, Mr. Granger—back in that caboose as that train moved to Arrow, you had certain duties to perform? A. Yes, sir.

Q. Making up reports? A. Yes, sir.

Q. What kind of reports?

A. Reports of the cars picked up at Lapwai, the consist of the cars, the numbers and the weights and where from and where to.

Q. That engaged your attention completely, did it not?

A. Yes, sir, but I did glance up a couple of times.

Q. Now, you say that you have no knowledge of the speed, only what you heard, is that right?

(Testimony of F. A. Granger.)

A. Yes, sir.

Q. That's what you heard after the accident?

A. Yes, sir.

Q. Was there a speed tape on that locomotive that day? A. Yes, sir.

Q. You spoke about part of your duties on that train that day was to pick up cars at Arrow?

A. Yes, sir.

Q. Did you communicate that information to Mr. Mely? [109-10]

A. I told Mr. Mely at Lewiston and North Lapwai.

Mr. McKeVitt: That's all.

Mr. Shone: That's all.

MRS. TILLIE MELY

called as a witness for the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Shone:

Q. Your name is what? A. Tillie Mely.

Q. What relation was A. E. Mely to you?

A. My husband.

Q. Where and when were you married?

A. At Sandpoint, June 20, 1942.

Q. That date was in 1942 that you were married?

A. Yes, sir.

Q. Where did you live with Mr. Mely?

A. At Spokane.

(Testimony of Mrs. Tillie Mely.)

Q. Did you live in Spokane with him during all of your married life? A. Yes.

Q. How old a man was Mr. Mely?

A. He would have been 55, December 8th.

Q. Of that year? A. Yes, sir.

Q. How old are you, Mrs. Mely?

A. I was 52 in September. [111]

Q. What kind of a life did you and Mr. Mely live in regard to your family life?

A. A very good life I would say.

Q. Was he a loving husband? A. Yes, sir.

Q. (By Mr. McKevitt): May I approach the bench with counsel?

The Court: Yes, you may.

(Conference between Court and counsel.)

Q. How did you and Mr. Mely get along during your married life? A. Just swell—very well.

Q. Did you go out socially? A. Yes.

Q. When you went out socially, were you accompanied by your husband? A. Yes.

Q. Were you always accompanied by your husband?

A. When he was in—when he was at home.

Q. Did you go to shows? A. Sure.

Q. While he was working——

The Court: Can you stipulate as to the earnings of this man at the time of his death?

Mr. Shone: Yes, I think so.

Mr. McKevitt: I believe we can. [112]

The Court: You may stipulate it into the record.

(Testimony of Mrs. Tillie Mely.)

Mr. Shone: It is stipulated between counsel that the gross earnings of A. E. Mely during the year 1949 was \$5,404.67 or a monthly average wage of \$450.39, and for the year 1950 that Mr. Mely's gross earnings were \$6,065.69 or a monthly average of \$505.48. For 1951 Mr. Mely's gross earnings was \$5,376.15 to November 12, 1951, or an average monthly sum of \$537.61.

Q. Out of Mr. Mely's monthly salary what did he do with it?

A. He generally cashed his check and he would take out what road money he needed, \$25 or \$30 a half and then turn the rest over to me for household expense and to put in the bank what we could.

Q. And out of the money that he gave you each month during the last year or two years, about how much of that money would be used necessarily for your support?

A. Well, including taxes and insurance and such, it took around \$325 a month, so I figure it would take about half of that for me.

Q. How much would that be for you?

A. Around \$150—60 or 70.

Q. Would that include your board and groceries and clothing and upkeep and necessities?

A. Yes, sir.

Q. All necessary incidentals?

A. That's right. [113]

Q. That \$150 to \$170 per month, was that necessary for your upkeep?

A. Yes, it would be when you include medical

(Testimony of Mrs. Tillie Mely.)

and dental expense, insurance and taxes, and fuel and so forth.

Mr. McKevitt: We admit all this.

Mr. Shone: Very well.

Q. And you were dependent upon your husband for your support? A. Yes, sir.

Mr. Shone: That is all.

Cross-Examination

By Mr. McKevitt:

Q. There were no children were there, Mrs. Mely? A. No, sir.

Mr. McKevitt: That's all.

Mr. Shone: Nothing further.

The Court: We will adjourn at this time until 1:30.

September 30, 1952—1:30 P.M.

MERLE C. MAURY

called as a witness for the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Shone:

Q. Mr. Maury, where do you live?

A. Spokane.

Q. How long have you lived in Spokane? [114]

A. 36 years.

Q. What is your business or occupation?

A. I am a conductor on the Northern Pacific Railroad.

(Testimony of Merle C. Maury.)

Q. How long have you been a conductor on the Northern Pacific Railroad?

A. I was promoted to Conductor in 1943.

Q. Have you acted as conductor a great portion of the time since then?

A. I would say off and on about half and half.

Q. Have you also been a brakeman?

A. Oh, yes, sir.

Q. What other positions have you held with the Northern Pacific?

A. At one time, it was in 1938, I was cut off on the road and I was pit foreman at Messa Pit, that is where they get gravel for the road.

Q. Any other positions?

A. No, that's all.

Q. During the time that you have been conductor for the Northern Pacific Railroad have you ever had an opportunity to be a conductor on the road—the Northern Pacific running from East Lewiston, Idaho, to Spokane, Washington?

A. Yes, sir.

Q. How long were you conductor, how many years?

A. It doesn't go by years, I would say on the trips I [115] have gotten off the extra board running as conductor since 1943, I couldn't name the trips.

Q. Have they been many or few?

A. Yes, I have caught many trips.

Q. In both directions?

A. Yes, both directions.

(Testimony of Merle C. Maury.)

Q. And the train that you acted as conductor on was what number?

A. Well, there was 661 west and 662 east.

Q. 662 east is going from Lewiston to Spokane? They call that east on the railroad?

A. Yes, sir.

Q. That would be a freight train?

A. Yes, sir.

Q. Extras? A. Yes.

Q. During the time that you have been a brakeman and conductor at any time did the Northern Pacific Railroad Company furnish you with a book of rules? A. Yes, sir.

Q. And when was that?

A. I first hired out in June, 1937.

Q. What were your instructions from your Company in regard to the book of rules?

Mr. McKevitt: We object to that question as being too general. [116]

The Court: He may answer.

A. Our instructions were that we were to be conversant with them and to understand them.

Q. Have you read the rules? A. Yes, sir.

Q. And are those rules known as the consolidated code of operating rules and general instructions? A. Yes, sir.

Q. During the course of your occupation as a brakeman and conductor did you stand any examinations on those rules by the Company officials?

A. Yes, sir.

Q. Over a course of what period?

(Testimony of Merle C. Maury.)

A. Well, since June of 1937, I believe I have taken six and possibly seven examinations.

Q. Are those examinations that you have taken on the rules before an examining board of the railroad Company or an inspector or something like that?

A. Yes, we have a man who is termed a rules examiner, appointed by the Company for that purpose.

Q. And he is the man who examines you on the rules? A. Yes, sir.

Q. And during the six or seven examinations you have taken, have you passed the examinations?

A. Yes, sir. [117]

Q. Did you flunk in any one of the examinations? A. No, sir.

Q. And by "flunk" I mean were you turned down? A. Never.

Q. And you are now familiar with the rules?

A. Yes, sir.

Q. And you now operate under the rules?

A. Yes, sir.

Q. Are you familiar with the stations, east of East Lewiston, Idaho? A. Yes, sir.

Q. Are you familiar with the station called Arrow? A. Yes, sir.

Q. And are you familiar with the yards of that station? A. Yes, sir.

Q. Now, when you were conductor or whenever you are conductor on that particular line, the train known as 662, is that a scheduled train?

(Testimony of Merle C. Maury.)

A. Yes, sir.

Q. And by scheduled train what do we mean?

A. Well, it's a train that runs on timetable schedule, the time is marked for each station and the time is naturally from your leaving station to the arriving station.

Q. Is that schedule put out by the Company in printed form? A. Yes, sir. [118]

Q. Referring to the Plaintiff's exhibit marked for identification number 23, I will ask you to state to the jury what that is?

A. This is Northern Pacific Railway Company, Idaho Division, timetable 75B.

Q. Are you familiar with that timetable?

A. Yes, sir.

Q. Did that cover the same period of time that is involved in this action—this accident, which occurred on November 11, 1951? A. Yes, sir.

Mr. Shone: I offer this in evidence.

Mr. McKevitt: I object to that as incompetent, irrelevant and immaterial.

The Court: It may be admitted.

Q. Referring to the schedule—what time was train 662 scheduled on its daily run from East Lewiston, Idaho, going east?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial, for the reason that the train he mentioned is not involved in this action in any way.

The Court: The exhibit itself is the best evidence.

(Testimony of Merle C. Maury.)

Mr. Shone: May I ask the witness to read from the timetable?

The Court: It is admitted in evidence [119] and you would have a perfect right to read it to the jury yourself.

Mr. Shone: May I do that now?

The Court: Yes, you may.

Mr. McKevitt: Your Honor has overruled my objection?

The Court: Yes. However, I don't know whether this is material or not.

Mr. Shone: "Leaves Lewiston at, 12:30 p.m."

Mr. McKevitt: What train, Mr. Shone?

Mr. Shone: 662.

Q. Is that correct? A. Yes, sir.

Q. Now, when train 662, is at East Lewiston, Idaho, ready for its scheduled run, are there times when they put that train 662 out as an extra?

A. Many times.

Q. Tell the jury what an extra is—what is meant by an extra train?

A. An extra train has no class—I mean by that, it has no schedule. It can run any time, on any track in any direction under orders, what we term train orders. It cannot leave its initial station without orders.

Q. When 662, which is scheduled for 12:30 p.m., is put out as an extra does it carry a flag designating it to Be an Extra, in Railroad parlance? [120]

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Merle C. Maury.)

The Court: He may answer.

A. Yes, sir, it does.

Q. What kind of a flag?

A. It carries two white ones on the fore part of the engine two and a half feet to three feet above the headlight.

Q. Now, when the extra leaves the station at East Lewiston, as an extra, then does the scheduled train go out at 12:30 p.m.?

A. No, sir, it does not.

Q. There is only one train there, is that right?

A. Yes, sir.

Q. And if it goes out as an extra, then the train does not run on schedule? A. That's right.

Q. And no other train is put out on schedule?

A. No, sir.

Q. Can you tell the jury the custom of the Railroad Company in putting out trains as an extra, not as schedule trains—if there are particular days that your Company would do that?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial and not in issue in this case. [121]

The Court: He may answer.

A. Well, of course, I have worked there a long time, and it's been my common belief that on Sundays they run extras, because they don't have to wait for stock or merchandise off the branch lines; there would be no reason, as I understand it, to hold them there for such.

(Testimony of Merle C. Maury.)

Q. Do they usually put out extras on Sundays, where they do not on week days?

A. Yes, sir, that's right.

Q. That has been a course of conduct?

A. Yes, sir.

Q. You mentioned stock and merchandise, and they put out these trains on Sundays because, there is no stock or merchandising, what do you mean by that?

A. What I mean by that—they don't have to wait for it to come in off the lines.

Q. Let me ask you this—do the workmen work seven days a week?

A. On the Camas Prairie Railroad, no—most of the jobs on the Camas Prairie are six day week jobs.

Q. The Camas Prairie operates over the N P lines? A. Yes, sir.

Q. From what station to what station?

A. East Lewiston to Arrow.

Q. And at Arrow where does the Camas Prairie line go? [122]

A. At Arrow the Camas Prairie line goes to Stites and out of Orofino they have another branch that goes to Headquarters.

Q. Where does the N P line go from Arrow?

A. Spokane.

Q. After they leave Arrow, are these two separate railroad branches? A. Yes, sir.

Q. And do they go in different directions?

A. Yes, sir.

(Testimony of Merle C. Maury.)

Q. You are familiar with the yards and yard limits of Arrow? A. Yes, sir.

Q. What designates the yard limits of Arrow, going east?

A. Yard limit board that has the words on it "yard limit."

Q. As conductor where do you usually stay?

A. In the Caboose.

Q. Is that the place where you are supposed to stay?

A. Yes, sir, I would say that you have a lot of work to do lining up trains and stuff.

Q. Mr. Maury, you have been sitting in Court all the time during this trial? A. Yes, sir.

Q. Near Counsel table? A. Yes, sir. [123]

Q. And you have heard all the witnesses testify that have testified in this case so far?

A. Yes, sir.

Q. You have heard them discuss the features of the yard at Arrow? A. Yes, sir.

Q. Are you familiar with the south siding near the west switch? A. Yes, sir.

Q. Are you familiar with two curves just west of the west switch? A. Yes, sir.

Q. Are you familiar with what is known as a logging train? A. Yes, sir.

Q. Have you seen them on the railroad tracks between East Lewiston and Arrow stations?

A. Yes, sir.

Q. Frequently? A. Yes, sir.

Q. How high are these logging cars?

(Testimony of Merle C. Maury.)

A. Three and a half feet.

Q. Are they about as high as what we call a flat-car?
A. Yes, sir.

Q. Is a caboose as high as a boxcar?

A. As high as a forty foot boxcar, yes, sir. Almost as high, maybe there is a few inches difference, I would say [124] the caboose is lower.

Q. You heard the testimony here as to where train 1648 was, upon the main track?

A. Yes, sir.

Q. The engine at the station house?

A. Yes.

Q. And the caboose, 604 feet east of the west switch?
A. That's right.

Q. And you heard the testimony—

Mr. McKevitt: I object to that, your Honor. I don't think is permitted to say to the witness "you heard this testimony and you heard that testimony." This witness might form one impression as to what he heard and Mr. Shone might have another impression. I object to the form of the question.

The Court: He hasn't asked whether that testimony is true or false of anything of that kind.

Mr. Shone: I will put a hypothetical question to the witness when I have finished.

The Court: You may proceed.

Q. You heard the testimony about the 15 box-cars parked on the south siding just east of the west switch?
A. Yes, I did.

Q. You heard by stipulation of counsel read in

(Testimony of Merle C. Maury.)

open Court, that from the rear of the caboose on the main line track, to the rear of the west car—boxcar on the south siding was 346 feet? [125]

Mr. McKevitt: I must object to this method of examination—counsel saying to the witness “you heard this” and “you heard that.” If this is for the purpose of establishing a basis for a hypothetical question, I have never heard of it.

The Court: This is a stipulated fact and I don't see any necessity of asking this witness.

Mr. Shone: I wasn't sure that he heard it.

Q. Now, Mr. Maury, under the facts as presented here in the Courtroom, under what rule, in your opinion, would you proceed in protecting, if necessary, within the yard limit at Arrow Station?

Mr. McKevitt: I object to that question on the ground that it is not properly framed and I object to it on the second ground that it is an attempt to establish a rule violation by the Northern Pacific Railroad Company, which rule violation will probably be urged as the cause of Mr. Mely's death, when that rule violation has not been pleaded in the complaint. As I pointed out to your Honor, there are twelve separate subdivisions of negligence contained in paragraph five of this complaint, and not in one of them, nor in any place in this complaint have we ever been apprised, until this moment, that the Northern Pacific was going to be charged with this man's death because of a violation of a rule which the Northern Pacific had established for [126] this man's protection.

The Court: The last part of your objection will

(Testimony of Merle C. Maury.)

be overruled; the first part will be sustained. I think the proper way to ask this question would be to assume certain facts and then ask it.

Mr. Shone: May I ask the Court if the Court is holding the complaint sufficient for the introduction of rules, if not I intend to ask leave to amend.

The Court: I am of the opinion that the allegations are sufficient, however, I will leave it up to counsel whether or not he desires to make any amendment.

Mr. Shone: In order to obviate any question, the plaintiff will now ask leave of the Court to amend subdivision 12 of paragraph 5, by adding thereto and at the end thereof at page five, "and defendant's negligent violation of its own operating rules."

Mr. McKevitt: If your Honor please, if you will examine the books there are 997 rules, which one, Mr. Shone, did we violate, according to you?

Mr. Shone: We will make proof of that.

The Court: It may be amended with the understanding that under the rules of discovery if counsel desires to submit to you any interrogatories in regard to just what rule or rules, that you will answer [127] them.

Mr. Shone: Yes, I will your Honor.

Q. Mr. Maury, assuming the following facts to be true; that on November 11, 1951—

Mr. McKevitt: May I interrupt a moment. I want to be acquainted with the thought in your Honor's mind in permitting the amendment, and

(Testimony of Merle C. Maury.)

granting defendant permission by interrogatories of some kind or other to request the plaintiff to designate the rule or rules which he claims were violated.

The Court: That's right.

Mr. Shone: I am prepared to give him that now. Do you want it now?

Mr. McKevitt: Sure, then we are through with that.

Mr. Shone: Rule 99, rule 101 and rule 108.

Mr. McKevitt: It is understood for the purpose of the record that the Northern Pacific Railway Company, defendant, objects to this amendment to include any rule violation of rules 99, 101, or 108, for the reason and upon the grounds that there is no allegation in the complaint that we violated any rule or rules, and that this comes as a matter of surprise to this defendant.

The Court: I will permit the amendment and if counsel desires further time to meet the amendment you [128] will be given an opportunity to do so.

Mr. McKevitt: Your Honor will appreciate my position here, frankly, I just have a hazy recollection of what rule 99 is—I don't know rule 101 or 108 from Adam's off ox because, I didn't know we were going to be charged with a violation.

The Court: You can think it over and if you need any time to get any witnesses, I will give you time.

Q. Now, assuming as true the following facts, that on November 11, 1951, extra train 1648 left

(Testimony of Merle C. Maury.)

East Lewiston at 10:35 a.m., and proceeded easterly into the yards and to the Station at Arrow in the State of Idaho, and while at Arrow the crew switched cars onto the main single line track within the station yards and built up a train of 85 cars with a caboose at the west end thereof, and with a locomotive at the east end thereof, standing upon the track in front of the Station house; that at that time and immediately before, there was on the south side of the track a siding which contained 15 box-cars which were about 346 feet—that is, the most westerly car of the boxcars on the siding were about 346 feet west of the caboose on the main line; that the 85 cars and caboose were stationary; that that train had been in the yards for about 25 minutes; that just west of this caboose standing on the main line, 604 feet, was [129] a switch; that west of the switch commences a curve and looking at the curve it is a left curve and then it goes into a right curve around a cliff; that the railroad has no block system between East Lewiston and Arrow station; that this was a Sunday, in which there was no knowledge on the part of that crew, stationed within the yards, that a train had left East Lewiston that morning, following their train, and with the knowledge that extras do run over that track on Sundays, under those circumstances and the further fact that the end forty or sixty cars of the 85 cars standing on the main line track were logging cars, about as high as an ordinary flatcar. Under those circumstances what, rule in your opinion, of the Consolidated code

(Testimony of Merle C. Maury.)

of operating rules and general instructions of the Northern Pacific Railway Company would be applicable?

Mr. McKevitt: I desire to object to the hypothetical question on the following grounds:

1. They have injected into this case issues not contained in the complaint.

2. That they have not sufficiently qualified this witness to testify on the matters and things contained within the hypothetical question.

3. That this witness is not qualified to testify what rule is applicable and what rule is not applicable.

4. There has been no evidence introduced here which would indicate in any manner that a rule violation [130] by the Company was or could have been the proximate cause of this man's death. If the objection is not well taken, or any portion of it, in addition, I object to the form of the question as not containing all of the factors required in a hypothetical question under the conditions as they exist. Now, if the objection is not well taken I desire to examine the witness on voir dire.

The Court: The objection will be overruled.

Mr. McKevitt: May I examine the witness on voir dire?

The Court: You may.

Q. (By Mr. McKevitt): Mr. Maury, how old are you? A. 36.

Q. You have been employed by the Northern Pacific since 1937? A. Yes, sir.

(Testimony of Merle C. Maury.)

Q. Continuously?

A. Except for periods in 1937 and 1938, while I was—what we term, cut off the board, due to lack of seniority.

Q. You were cut off the board due to lack of seniority in 1937 and '38? A. That's right.

Q. And when you speak of seniority, you are speaking of rights that you have over other men who are in service a lesser time than you? [131]

A. That's right.

Q. What rights have you at the present time with the Northern Pacific, as a conductor?

A. Well—

Q. —What is your seniority rating?

A. I would say right now I am about two men from the conductors extra board.

Q. Right now you are two men from, meaning away from? A. Yes.

Q. From the conductors extra board?

A. Yes, sir.

Q. What does that mean?

A. The Conductors extra board is like the Brakemens extra board, only on the Conductors extra board you have a guarranty of so many miles per month, what I mean by miles—I mean wages, I believe it is 3000 miles.

Q. You say you believe, don't you know?

A. Yes, I know.

Q. What is the fact? A. It is.

Q. 3000 miles? A. Yes.

(Testimony of Merle C. Maury.)

Q. You use the figure 3000 miles, what do you mean by that?

A. It means that you are paid—the rate of pay is classed so much per hundred miles. [132]

Q. In other words—

A. In other words, a day's pay.

Q. In other words, before you can get the position you are talking about, there are two men ahead of you, is that what you mean?

A. No, sir—it's pretty hard to explain but I will do my best—it means that—a conductor's extra board is just the same as a regular conductor's job whether you are on a main line job or a local, it is still a regular job as a conductor, but they can reach down on your job as we call it, if you are holding a regular job braking on the local or the main line freight, they can reach down and use you as a conductor. Sometimes it might be two weeks or even longer before you return to your own job as a brakeman.

Q. Have you finished your answer?

A. Yes, sir.

Q. Your period of employment during 1937, was fifteen years ago? A. Yes, that's right.

Q. What type of work did you begin with?

A. Brakeman.

Q. How long did you work as a brakeman, beginning in 1937?

A. I was promoted, after rules examination, in 1943 to a conductor. After that I was eligible to run as a conductor. [133]

(Testimony of Merle C. Maury.)

Q. In other words you were promoted by virtue of an examination in 1943—

A. That's right.

Q. And under these rules you had the information that qualified you to run as a conductor, isn't that true?

A. That's right.

Q. But between 1937 and '43 you had never run as a conductor?

A. No, sir.

Q. Now, after 1945, after you had passed this examination, when did you first run as a conductor?

A. I haven't the record, but I think it was 4 or 5 days after the examination.

Q. And what was your run?

A. I can't remember, I expect it was main line freight.

Q. That has no connection with this branch?

A. No, sir.

Q. How long did you run as a conductor beginning in 1943?

A. Off and on, I would say all during the war sir, and up until well in 1945.

Q. You say, off and on, you mean you would run sometimes as a conductor and somebody would have more seniority than you and bump you and you would run as a brakeman, is that right?

A. Well, the same thing, yes, sir.

Q. Have you been running as conductor, beginning with 1951, November 11, the date of this accident, had you [134] been running as a conductor? Had you been regularly running as a conductor?

A. No, sir, off and on.

(Testimony of Merle C. Maury.)

Q. Now, what do you mean by "off and on"?

A. On account of my job—the Coeur d'Alene local I might be a brakeman for one day, that is a one day job, and the next day I might catch a run on the chain gang or a local or something of that sort.

Q. When was the last time you ran as a conductor on any line of the Northern Pacific?

A. I think sir, it was around the 10th or 12th of February.

Q. 1952? A. Yes, sir, 1952.

Q. Did I understand you to say that you have run as a conductor of the P & L branch, where this happened—a freight conductor?

A. Where this happened?

Q. Yes, have you run as a freight conductor over this line? A. Oh, yes.

Q. Prior to this accident? A. Yes, sir.

Q. On how many occasions?

A. On 661, I couldn't name the times, I can't remember, it was over a period of years.

Q. Now, the question has been put to you, do you know what [135] rule counsel is referring to?

A. Rule 99.

Q. Is that the rule he is referring to?

A. Yes, sir.

Mr. McKevitt: No further questions on voir dire.

(Testimony of Merle C. Maury.)

Direct Examination

(Continued)

By Mr. Shone:

Q. Now will you answer the hypothetical question—do you remember the question I put to you?

A. Yes, I think I do.

Mr. McKevirt: I have already made my objection on several grounds.

The Court: Yes, you have, go ahead.

Q. What rule, in your opinion, would govern that situation?

A. Could I explain in my own words?

Q. You just tell me what rule first?

The Court: I think you should let him explain it in his own words.

Mr. Shone: Yes, O.K.

A. In various examining cars I have been in, oral examinations and written examinations, they always stress one point, that is rule 108.

Mr. McKevirt: Your Honor, I object to this as not responsive, he was asked what rule would govern.

The Court: I believe I will let the witness go ahead. [136]

A. The reason I referred to rule 108, it is the rule that says in case of uncertainty or doubt follow the safe course. Well, that's a general rule, whenever in case of uncertainty or doubt you follow a specific rule which is 99 the flagging rule to protect your own train.

(Testimony of Merle C. Maury.)

Q. And that is the rule you would have followed, in your opinion, under these circumstances?

A. Yes, sir.

Mr. Shone: We offer in evidence rule 99.

Mr. McKevitt: We object as incompetent, irrelevant and immaterial and not within the issues.

The Court: It may be admitted and you may read it into the record.

Mr. Shone: Rule 99 of the consolidated code of operating rules and general instructions found on page 48.

Mr. McKevitt: That does not apply.

Mr. Shone: Just a minute, it is page 47, Rule 99: "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with the flagman's signals a sufficient distance to insure protection, taking two torpedoes and when necessary, in addition displaying lighted fusees, and when recalled and safety to the train will permit, he may return. When conditions [137] require, he will leave the torpedoes and a lighted fusee. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection, by night or by day, when the view is obscured lighted fusees must be thrown off at proper intervals. When day signals cannot be plainly seen owing to weather or other conditions, night signals must be used. Conductors and Engineers are responsible for the protection of their trains."

(Testimony of Merle C. Maury.)

Q. Now, you spoke of a general rule, 108; would that as a general rule be applicable under the facts as I have stated them to you?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial and for the additional reasons heretofore stated.

The Court: He may answer.

A. Yes, sir.

Mr. Shone: We offer in evidence rule 108 of the consolidated code of operating rules and general instructions.

Mr. McKevitt: We object to that as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: It may be admitted.

Mr. Shone: Rule 108 of the consolidated code of operating rules and general instructions found on page [138] 55 is as follows——

Mr. McKevitt: May I inquire does this rule have a separate number as an exhibit?

The Court: I was proceeding a little differently, I was having him read them into the record. I think the book is in evidence.

Mr. Shone: The book is in evidence as exhibit 24. This is your exhibit.

Mr. McKevitt: Not my exhibit, I tried to get it in but they wouldn't let me.

The Court: The clerk advises me that it was marked as your exhibit, and it may be admitted.

Mr. Shone: Rule 108——

Mr. McKevitt: So far as the record is concerned,

(Testimony of Merle C. Maury.)

is that book admitted as a defendant's exhibit? If that is the proposition then I object at this time because he is introducing certain rules there that we say do not apply. If your Honor is going to rule that it is admitted as Plaintiff's exhibit that's all right, but I am not conceding that the book and those rules that he has now offered go in as a defendant's exhibit. I am bound by those rules if I admit that.

The Court: I don't want to get too much confused myself. We will show that it is plaintiff's exhibit as to these two rules and these two only, and it is admitted. [139]

Mr. Shone: I quote the rule: "In case of doubt or uncertainty the safe course must be taken."

Q. Are there any other rules in this rule book that we are speaking about which in your opinion would govern the circumstances and facts as I have stated them to you?

Mr. McKevitt: I want to object to the form of the question and object to it on the ground that it is vague and uncertain and on the ground that it is not within the issues of this case.

The Court: He may answer.

A. Yes, there would be another one.

Q. What one? A. Rule 101.

Mr. Shone: We offer in evidence rule 101.

Mr. McKevitt: We object on the grounds previously stated with reference to the other rules.

The Court: It may be admitted and you may read it into the record.

(Testimony of Merle C. Maury.)

Mr. Shone: Rule 101 which plaintiff has offered as an exhibit and found on page 50, of the consolidated code of operating rules and general instructions reads as follows: "Trains must be fully protected against any known condition not covered by the rules, which interferes with their safe passage."

The Court: For the purpose of the record you will have to pick those rules out and mark [140] them individually as offered and admitted.

Mr. Shone: You may cross-examine—that is all.

Cross-Examination

By Mr. McKevitt:

Q. Will you look at that exhibit? Mr. Maury, by virtue of the examination which you say that you have passed in connection, with the operating rules, you feel that you are acquainted with them, do you not? A. Yes, sir.

Q. Do you know how many railroads have adopted the Consolidated code of operating rules and general instructions?

A. In this territory out here, I believe it is five.

Q. Will you name the Companies?

A. Chicago and Milwaukee; Union Pacific; Northern Pacific; the Great Northern and the SP&I.

Q. And it is your understanding then, that those Railroads after discussion among the various operating officials in this particular territory—the northwest territory—have agreed that these are

(Testimony of Merle C. Maury.)

standard rules and should be adopted for Railroad operation? A. That's right.

Q. For whose benefit are those rules promulgated and adopted?

A. I would say for the benefit of the employees and also for the benefit of the Company. [141]

Q. And for the benefit of the public generally?

A. That's right.

Q. Now, on page three of that book is shown the Railroads that operate under those rules?

A. That's right.

Q. And that edition is 1945? A. Yes, sir.

Q. And it states therein on page 3 as follows: "Rules herein set forth govern the Railroads as operated and listed below: To take effect December 1, 1945, superseding all previous rules and instructions inconsistent therewith. Special instructions may be issued by proper authorities." Is that right? A. Yes, sir.

Q. What is meant by special instructions?

A. Special instructions is a card used in conjunction with your timetable schedule outlining the physical characteristics of the road, bridges, slow orders, curves, speed restrictions, anything pertaining to the safety of the train.

Q. In other words—correct me if I am wrong—are in addition to the general rules set forth in the code? A. Yes, sir.

Q. And on page three it enumerates the Railroads and the various officials of those companies agreeing thereto? [142] A. That's right.

(Testimony of Merle C. Maury.)

Q. Now, kindly turn to page 5. There is listed there a general heading "General Rules" is that correct? A. That's right.

Q. Now, turn to page 6 please. At the bottom of page 5 first——

The Court: I call counsel's attention to the fact that the rules have not been introduced in evidence.

Mr. McKevitt: I desire to introduce defendant's exhibit 24, as a part of the cross-examination of this witness, but by virtue of its introduction I do not want the record to indicate that we feel that we are bound by the provisions of rules 99, 101 and 108. With that understanding I offer this exhibit as defendant's exhibit, As a Part of the cross-examination of this witness.

Mr. Shone: We have no objection.

The Court: It may be admitted.

Q. Will you please read to the Court and Jury, subdivision M, on page five under the heading "General Rules." Read it clearly and distinctly, please?

A. "Employees must exercise care to prevent injuries to themselves or others by observing the condition of equipment and the tools which they use in performing their [143] duties, and when found defective, when practical will put them in safe condition, reporting defects to the proper authorities."

Mr. Shone: Now, we move to strike the testimony of this witness in regard to general rule M, on the ground that it is not proper cross-examination; that we have previously agreed that the equipment

(Testimony of Merle C. Maury.)

and tools were safe on this particular day and on this particular train, and has no application to the case at this time.

The Court: I think that is right.

Mr. McKevitt: I think so, too, your Honor.

Q. Now, will you kindly read the next paragraph there on page 6?

The Court: The last answer may be stricken.

A. They must inform themselves of structures or obstructions where clearances are close.

Q. "They" refers to Railroad employees?

A. Yes, sir.

Q. "They must inform themselves as to the location of structures or obstructions where clearances are close." That rule, of course, was in effect at the time of this accident, wasn't it?

A. That's right.

Q. Now, go to the next one.

A. "They must expect trains to run at any time, on any track in either direction." [144]

Q. "They must expect trains to run at any time, on any track in either direction," that word they, then, referred to Mr. Mely, on November 11, 1951?

A. Yes, sir.

Q. You are acquainted with the fact are you not, that 6015 was an extra? A. Yes, sir.

Q. That is a train classification—when you call a train an extra, it means that it is a different type of train than some other type of train?

A. Yes, sir, it means that it is not running by timetable schedule.

(Testimony of Merle C. Maury.)

Q. It means that it does not run by timetable schedule? A. Yes, sir.

Q. If I understand your testimony, and you correct me if my statement isn't accurate—it is to the effect that on the day in question, the Northern Pacific violated rules 99, 101 and 108?

A. Yes, sir.

Q. Now, when you say the Northern Pacific violated, Rule 99, that is just a broad statement—the Northern Pacific, what man on the Northern Pacific violated rule 99?

Mr. Shone: We object to that as calling for a conclusion of the witness. Under the law it is immaterial—the men who were working for either crew, on engine 6015 or 1648, were servants and agents [145] of the Northern Pacific, and it is pleaded in the complaint and it is admitted in the answer that those two crews were servants and agents of the Northern Pacific Railway Company——

(Further remarks of Court and Counsel.)

The Court: I want this whole matter before the jury. I will let the witness answer. I don't doubt, Mr. Shone, but what you have some authority to submit on this question, but I will permit him to answer—he has qualified here as an expert on rail-roading. You may read your rule 99.

Q. Now, read rule 99.

A. "When a train stops under circumstances in which it may be overtaken by another train, the

(Testimony of Merle C. Maury.)

flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fuses. When recalled and safety to the train will permit, he may return." Shall I go on?

Q. Yes, go on.

A. "When the conditions require, he will leave the torpedoes and a lighted fusee. The front of the train must be protected in the same way when necessary by the forward brakeman, fireman or other competent employee. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full [146] protection. By night, or by day when the view is obscured, lighted fuses must be thrown off at proper intervals. When day signals cannot be plainly seen, owing to weather or other conditions, night signals must be used. Conductors and engineers are responsible for the protection of their trains."

Q. Now, answer my question please.

(Question read by reporter.)

Mr. Shone: May I have the same objection?

The Court: Yes, and he may answer.

A. I would say any competent employee on the hind end of that train.

Q. What train? A. 1648.

Q. That is the train that was in charge, as you well know, of conductor Eddie Feehan, was it not?

(Testimony of Merle C. Maury.)

A. Yes, sir, I knew him well.

Q. The brakeman operate under his instructions, do they not? A. That's right.

Q. If there was a duty to obey this rule, then that question was up to Eddie Feehan to see that it was done, is that right? A. Yes, sir.

Q. Then it is your testimony to this jury that Eddie Feehan was responsible for that wreck?

A. I knew Eddie Feehan very well—he was a good friend of mine—— [147]

Q. My question is—is it your opinion as an expert on these rules that Eddie Feehan was responsible for his own death, Mely's death and Brown's death and the injuries to these other people and the destruction of all this property—is that your opinion? A. Not altogether, no, sir.

Q. State whether or not it is your opinion, that Eddie Feehan, the conductor in charge of train 1648, was responsible for this collision?

Mr. Shone: We object to that—the witness has already answered the question.

The Court: The court recognizes that the witness is in a hard position. He will have to answer the question.

A. All right—yes.

Q. Now, Mr. Maury, will you turn to page 44 of the rule book—do you have the page?

A. Yes, sir.

Q. It is your understanding, is it not, that this unfortunate collision occurred within yard limits?

A. Yes, sir.

(Testimony of Merle C. Maury.)

Q. What, as an experienced conductor—brakeman and conductor—is meant by yard limits?

A. It means that a train working inside of those limits does not have to protect against other [148] trains.

Q. And when you say a train working within yard limits does not have to protect against other trains, you are referring, are you not, to train 1648, Eddie Feehan's train? A. That's right.

Q. And you are referring to the fact that it was not incumbent upon him, under the rules, to protect his train against extra 6015, isn't that right?

A. In a way, yes.

Q. Totally yes. Now, will you kindly read rule 93?

A. "Within yard limits the main track may be used clearing first class trains when due to leave the last station where time is shown. In case of failure to clear the main track, protection must be given as prescribed by rule 99. Within yard limits the main track may be used without protecting against second or inferior class, extra trains and engines."

Q. Just a moment, stop there. "Within yard limits the main track may be used without protecting against second and inferior class, extra trains and engines." That rule was in effect November 11, 1951, was it not? A. Yes, sir.

Q. Both of these trains were within the yard limits, as you know? A. Yes.

(Testimony of Merle C. Maury.)

Q. What is meant by the language "against extra trains"? [149]

Q. "Protect against extra trains," or "without protecting against extra trains" means that you don't have to have a flagman out.

Q. That means that it was not the duty of Eddie Feehan to send any brakeman back to put out a fusee, or a flare or a torpedo on the day in question?

A. That's right.

Q. Having in mind that answer, do you still want to adhere to Your Previous Testimony That Eddie Feehan was responsible for those three deaths?

A. I believe I answered that; I said "not altogether." I Think I can explain that answer.

Q. Was he partially responsible for the death of those people, for the death of Mely and Brown?

A. Yes, sir.

Q. If he didn't have to send back a flagman and if he wasn't required to put out a fusee or flare or torpedo then he was obeying the rule, wasn't he?

A. Yes, he was.

The Court: He asked to explain his answer and I will permit that.

Mr. McKevitt: Yes, if he wishes to.

Q. Now, explain your answer, you say "not altogether"?

A. It has been our practice up in the Idaho Division, on the various branches, and I might say, when I say it has been that way up there, I worked on the Camas [150] Prairie, years, and we have been told in examining Cars Also, I think they term it

(Testimony of Merle C. Maury.)

“create a hazard,” and I can name various times and various towns we have been switching in, especially in handling a great amount of cars—I can say this as a fact, we always—

Q. Are you speaking now of the P & L branch where this accident happened? A. Yes.

Q. At this section point in Arrow?

A. No; I am not speaking of that.

Mr. McKevitt: Then I object to his explanation in that regard, your Honor.

The Court: He may complete his answer.

A. We have found it always a safe practice to put down two torpedoes, especially if you know there is an extra pretty close on that line, just to save ourselves and put ourselves in the clear, not only that, but to protect the other engineer, too. It's what I think they term “good railroading.”

Q. You know the circumstances that obtained here? A. Yes, sir.

Q. Now, just assume that you were similarly placed, as was Eddie Feehan—by the way, do you know that that train was about to move out of Arrow, that the air was cut in, the Engineer was in the cab and they were about to depart? [151]

A. That is what I heard.

Q. Assuming that you were in charge of the train, such as Eddie Feehan was, under those conditions, as a conductor on the P & L branch, during the time that you say you operated, did you ever do what you have just described as sometimes done, at Arrow? A. Not at Arrow.

(Testimony of Merle C. Maury.)

Q. No; now will you read the following paragraph on page 44, the fourth paragraph? No, it is paragraph 3.

A. "Within yard limits second and inferior class, extra trains and engines must move at restricted speed."

Q. Within yard limits second and inferior class, extra trains and engines must move at restricted speed. What train was controlled—what Engineer was governed by that Rule on November 11, 1951, in connection with this accident?

A. Both Engineers on both trains.

Q. Did that rule govern and control Engineer Mely?

A. Yes, sir.

Q. Have you had occasion to examine defendant's exhibit 22 for identification, you have looked it over, have you?

A. No, I haven't.

Q. Will you step down here?

A. Yes, sir.

Q. Take a look at that map because I want to ask you a few [152] questions. Is it not a fact that on that map is shown what might be called a warning sign, first, is there not a yard limit Board at this point I am pointing to?

A. Yes, sir.

Q. Now, working back—further back, is there another sign which advises the Engineer that he is approaching the yard limit board?

A. Yes, sir.

Q. Where is that?

A. Here (indicating).

Q. What is the purpose of the warning sign?

A. It is to tell the Engineer that the yard limit is ahead.

(Testimony of Merle C. Maury.)

Q. Under the rules, then, that were in effect on that date, the Engineer sees that warning sign, and knowing that there is a yard limit board further to the east, there is some duty devolved upon him, is there not? A. Yes, sir.

Q. What duty was there on that date on Engineer Mely? A. I would say to be alert.

Q. What else? A. How do you mean?

Q. You say to be alert, that is one thing—is that all; that means just to look and see, and be able to see what is going on? In addition to being alert what else was he called upon to do, if anything? Maybe I can refresh your recollection by repeating: “Within [153] yard limits second and inferior class, extra trains and engines must move at restricted speed”?

A. Oh, yes. Of course, that is up to his judgment.

Q. In other words, it is up to him to determine whether or not he is moving at restricted speed?

A. That’s right.

Q. Kindly turn to, under the heading “definitions” in the rule book on page 8?

A. Yes, I have it.

Q. Do you see a heading there, “restricted speed”?

A. Yes, sir.

Q. Will you kindly read that to the Court and jury?

A. “Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced.”

(Testimony of Merle C. Maury.)

Q. "Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced." That rule controlled Engineer Mely on that date, did it not?

A. I would say so; yes.

Q. And if it was necessary to reduce that speed to ten miles an hour, under that rule, he was required to do it, was he not? A. Yes, sir.

Q. In other words, under that rule, is it not a fact that it was Engineer Mely's duty to have that train [154] under such control that when he applied the brakes he could stop short of the rear end of the caboose into which his Engine crashed—that was his duty, wasn't it? A. Yes.

Q. In other words, is it not a fact that the warning Board is an extra caution to him? When he hits that sign it warns that at a further distance east is the yard limit board, then he should begin to get his train under absolute control, shouldn't he, before entering the yard limits?

A. Yes, sir; I would say so.

Q. You have referred to rule 99, and his Honor has read it and it has been read; now, isn't it a fact, Mr. Maury, that that rule refers to train operation outside of the yard limits?

A. That isn't what it says in the book, Mr. McKevitt.

Mr. McKevitt: Will you read the question, Mr. Reporter?

(Question read by reporter.)

(Testimony of Merle C. Maury.)

Q. Now, that can be answered "yes" or "no."

A. No, it doesn't. I never realized I answered like that.

Q. Is it your testimony that that rule refers to trains within the yard limits and also without the yard limits?

A. Under certain circumstances, yes, sir.

Q. Circumstances that are referred to there where the [155] language is used, "When a train stops under circumstances in which it may be overtaken by another train," means this, does it not—you are familiar with the fact that when you leave this bridge there is an area in here where there is no yard limit, is that right?

A. Yes.

Q. The circumstances that are referred to in that rule are these: That if Eddie Feehan's train for some reason or other had stalled in this area outside of yard limits—those are the circumstances that would require him to go back and protect against 6015, that's true, isn't it?

A. Yes. What I meant, Mr. McKevitt, it doesn't refer to yard limits in Rule 99.

Q. That's exactly what I am talking about. Rule 99 does not refer to yard limits, does it?

A. It just says any place.

Q. What I am asking you, you have one rule that is a yard limit rule, don't you?

A. Yes, sir.

Q. That is 93? A. Yes.

Q. Then you have 99? A. Yes, sir.

Q. You know, Mr. Maury, that 99 doesn't refer

(Testimony of Merle C. Maury.)

to yard limits because you have a separate yard limit rule; you [156] know that, don't you?

A. Yes, sir.

Q. Isn't it a further fact that rule 99 only requires you to flag against first class trains within yard limits? A. That's right, sir.

Q. And 6015 and 1648 were not first class trains, we are agreed on that? A. That's right.

Q. Isn't the fact within your information that extra train 1648 east was known as the Stites Local, you knew that? A. Yes, sir.

Q. And was an assigned run, to your knowledge, that left East Lewiston on Sundays, isn't that correct? A. It wasn't to my knowledge.

Q. I see—in other words, you had no knowledge one way or another on that subject, you don't know. Is that true? A. That is correct.

Q. What schedule it operated on, that is, 1648, you do not know? A. No, I didn't.

Q. You read to the Court and jury rule 108 on page 55, "In case of doubt or uncertainty, the safe course must be taken." That refers to the condition set out in 107. Read 107, just ahead of that. [157]

A. "Trains or engines must run at restricted speed in passing a train receiving or discharging traffic at a station, except where proper safeguards are provided, or the movement is otherwise protected. They must not pass between it and the platform at which traffic is being received or discharged, unless the movement is properly protected."

Q. Now, rule 108, "In case of doubt or uncer-

(Testimony of Merle C. Maury.)

tainty, the safe course must be taken," refers to rule 107, does it not?

A. No, sir; I wouldn't say it did.

Q. What does it refer to? Does it refer to all the rules in the book? A. Yes, sir.

Q. Well, now, in case of doubt or uncertainty, as that language is used, as used in that rule, under the circumstances as you know them to have existed on that date, what doubt, or what uncertainty could have been in Eddie Feehan's mind?

A. Well, he knew there was cars on the siding; that he would be obstructed; that he had a bank on the other side, and he knew probably, working on the Camas Prairie, that 662 would be running extra, and it might not know anything about him being there, under the circumstances that is what I would say.

Q. In other words, you say that Eddie Feehan very likely knew or should have known that 662, which went down to Lewiston as a scheduled train, would not be 662 [158] leaving Lewiston but would be extra 6015?

A. I imagine Eddie knew. It was the common practice out there, on Sundays was the time to run them extra.

Q. You imagine Eddie knew that?

A. Yes, sir.

Q. That he knew 6015 would be coming along there? A. Yes, sir.

Q. Do you think Eddie knew or would be presumed to know what time extra 6015 was called?

(Testimony of Merle C. Maury.)

A. Yes, sir.

Q. It wouldn't be on any order book?

A. No, it wouldn't be on any order book. He has a phone——

Q. At Lewiston?

A. No; at Arrow, he could have found out, and he could have found out at North Lapwai.

Q. Have you ever done that, running as a conductor on an extra, on that line?

A. Not on that line; I have on the main line.

Q. I am not talking about the main line—you have never done it on this line, have you?

A. Let's see——

Q. Your answer is no?

A. I can't remember whether I have or not.

Q. If you will examine this map—you will notice the yard limit board is here?

A. Yes, sir. [159]

Q. Now, one question further, assuming that the yard limit Board was 4319 feet from the point of collision, is it your opinion in this case that when Engineer Mely passed that yard limit board, that he was proceeding at restricted speed?

A. Maybe not, and maybe yes.

Q. That is the best answer you can give?

A. All I can say is that I wasn't the Engineer, I wasn't there, I wasn't even on the train.

Q. You are testifying as an expert; are you able to express an opinion as to whether he was traveling at restricted speed when he passed that yard limit board?

(Testimony of Merle C. Maury.)

Mr. Shone: We object to that as incompetent, irrelevant and immaterial and it calls for a conclusion of this witness. It is entirely without the knowledge of the witness even if he is an expert.

The Court: I don't see how he could possibly answer——

Mr. McKevitt: Now, if the Court please——

The Court: Go ahead; I am not going to argue with you about this; he may answer, if he can, but he has said that he doesn't know anything about the speed and I guess the presumption is that he was driving properly. Go ahead, he may answer.

A. I am afraid that I am not qualified to give an opinion on how fast he was going; if it had been my own train [160] I might have an opinion.

Q. Very well, do you wish to testify in this case as a thoroughly disinterested witness?

A. Yes, sir; absolutely.

Q. Isn't it a fact at the present time you have pending in the District Court in Silver Bow County, Butte, Montana, an action against the Northern Pacific Railway Company in which action Mr. Shone is your attorney and in action you are suing the Northern Pacific Railway Company for \$125,000.00 for injuries you claim you received while in its employ?

A. That's right.

Mr. McKevitt: That's all.

Redirect Examination

By Mr. Shone:

Q. Mr. Maury, in regard to the last question asked by counsel——

(Testimony of Merle C. Maury.)

The Court: I hope that you gentlemen are not going to start in and try some other case here.

Mr. McKeivitt: This is for the purpose of——

The Court: Go ahead; it seems I waste more time than counsel when I try to hurry this along.

Q. How do the employees of a railroad seek compensation if they are injured?

Mr. McKeivitt: That is objected to as [161] incompetent, irrelevant and immaterial.

The Court: He may answer.

Q. If you know.

A. Well, unless you accept what the claim department of the railroad Company gives you the only recourse you have is under the Federal Liability Act, which means only that the course open to you is to go to Court.

Q. You are not under the Compensation Act?

A. No, sir.

Q. And you must ask the Judge and Jury to decide how much you are entitled to?

A. That's right.

Q. And Congress has passed that law?

A. That's right.

Q. Now, Mr. Maury, can you tell in miles per minute, what is meant by reduced speed, in miles per minute?

A. Yes; if you reduce five miles an hour you are reducing speed and if you reduce fifty miles an hour you are reducing speed.

Q. Now, as to a restricted speed, is there any

(Testimony of Merle C. Maury.)

maximum speed limit within the yard on this railroad line? A. No.

Q. On November 11, 1951? A. No.

Q. Is there anything in the rules that defines restricted speed at a maximum number of miles per minute? [162] A. No, sir.

Q. Now, restricted speed or reduced speed, as I understand your testimony, is the judgment of the engineer? A. That's right.

Q. In operating the train?

A. That's right.

Q. In other words, he must get his train over the road? A. That's right.

Q. Now, when you said rule 99 applies under the facts which I gave you, you were taking into consideration the obstructions—the facts which I framed in that question as being true, were you?

A. Yes, sir.

Q. And where the train or the car, whatever it might be, on the track, then you claim that rule 99 would apply? A. Yes, sir.

Q. Now, as this train 1648 left Lapwai and came to the yards at Arrow, if they found that obstruction by those boxcars on the south siding, what would the Engineer or Conductor have done, or what should he have done, or they, or any member of the crew?

Mr. McKevitt: We object to this as incompetent, irrelevant and immaterial and not proper redirect examination.

(Testimony of Merle C. Maury.)

The Court: I think he has covered this fully, but he may answer again. [163]

A. As I said, what I would do, I would immediately put out my torpedoes and check my train, a little anyway.

Mr. McKevitt: We move that the answer be stricken and the jury be instructed to disregard it, as not being within the issues here.

The Court: He has already testified to this in reply to other questions. I will strike it on the ground that it has been answered heretofore.

Q. Now, as to rule 93, which counsel asked you about within the yard limits, "Within yard limits the main track may be used without protecting if the train was obscured from view of an oncoming train." Would that rule apply or would rule 99 apply, in your opinion?

Mr. McKevitt: Objected to as not proper re-direct examination; the rule speaks for itself, and this witness has no right to interpret the rule unless there is ambiguity in it.

The Court: I think he has answered it clearly before; if he hasn't, I will let him answer it. Do you know the question, Mr. Witness?

A. No, I don't.

(Question read by reporter.)

A. In the interest of safety, I would say that rule 99 applied.

Q. Referring you to Plaintiff's Exhibit 11, you

(Testimony of Merle C. Maury.)

are familiar with that curve which is west of the west curve? [164] A. Yes.

Q. Is that the sharp curve? A. Yes, sir.

Q. If a car was left just east of that curve, say 100 feet and that would be the last car of a string of cars, that is within yard limits, is it not?

A. Yes, sir.

Q. And would that be such a circumstance as would warrant putting out torpedoes, in your opinion?

Mr. McKevitt: That is objected to as incompetent, irrelevant and immaterial and is not subject to expert testimony. The rules are in evidence and speak for themselves.

The Court: He may answer.

A. Yes, sir; absolutely, I would.

Q. Would there be any doubt in your mind about it? A. No.

Q. You told the jury in regard to a question asked by Mr. McKevitt, regarding the putting down torpedoes, that you didn't do it at the station of Arrow, but that you did it at other places on this line?

A. On the main line, and on the C W Branch and the P & L Branch.

Q. While your train was in the station yard?

A. Oh, yes.

Q. You have put them down? [165]

A. Yes, sir.

Q. Now, the rule that Mr. McKevitt drew your attention to on page 6, as follows: "They must

(Testimony of Merle C. Maury.)

expect trains to run at any time, on any track, in either direction." Did that rule apply to train 1648 while it was at the Station at Arrow?

A. Yes, sir; it applies to any train.

Q. They could expect a train to run in either direction at any time? A. Yes, sir.

Q. And this being Sunday and them knowing that extra trains were put out on Sunday they could expect another following train to come into that station? A. Yes, sir.

Q. Mr. Maury, are you still an employee of the Northern Pacific Railway Company?

A. To my knowledge I am, yes.

Q. The fact that you bring a lawsuit does not mean that you are not an employee? A. No.

Q. It doesn't cancel your position?

A. No, sir.

Q. And regardless of the outcome of your lawsuit you still retain your rights and act as an employee? A. Yes, sir.

Mr. Shone: That's all.

Recross-Examination

By Mr. McKevitt: [166]

Q. I think I understood you to say in response to a question by Mr. Shone, about this lawsuit in Butte, that you either take what the claim department offers you or you have to sue?

A. That's right.

Q. I suppose that the Claims Department offered

(Testimony of Merle C. Maury.)

you a certain amount in this case and you said, "No, I am not entitled to that—I want \$125,000.00"?

Mr. Shone: I object to that as incompetent, irrelevant and immaterial, and is an attempt on the part of counsel to prejudice the jury.

The Court: Yes—I don't want to try any other lawsuit here. I don't know anything about the merits or the demerits in any other case and he has stated that he had this suit and he said that is the only way he could recover unless he would make a settlement.

Mr. McKevitt: My thought was this, your Honor, I introduced this for the sole purpose of showing that this man is not a disinterested witness. Your Honor agreed with that, and then Mr. Shone went into the question of—if you get hurt by the Company you have to sue them, unless you settle with the Claim Department. I would have left it alone entirely if he hadn't opened the subject up [167] again.

The Court: I think I will stop now, and instruct the Jury to disregard any testimony that this witness gave from the witness stand in regard to this lawsuit that he has in Montana, except the fact that he does have a lawsuit against the Railroad Company.

Q. Now, Mr. Maury, am I correct in my recollection of your testimony that on November 11, 1951, you stated that there was no speed restriction in that area, the train Mr. Mely was operating, did

(Testimony of Merle C. Maury.)

you so testify? A. I don't remember; did I?

Q. Do you recall Mr. Shone asking you that question, if there was any maximum speed in that area?

A. What area do you mean? Do you mean the yard limits—

Q. On that whole line, for that type of train. Do you recall him asking you if there was any maximum speed prescribed, and wasn't it your testimony that there was not?

Mr. Shone: We object to the form of the question. I believe I asked him whether there was any particular speed limit under the rule of restricted speed, and also under the rule of reduced speed.

Mr. McKevitt: My recollection of the testimony is, and, of course, it is ultimately for the jury to determine who is correct, that he was asked the question in substance and he testified in effect, that on November 11, 1951, there was no maximum speed limit prescribed for train 6015. [168]

The Court: I will go just a little farther with you and say that I think that was within the yard limits. I may be wrong and we may have to go back and have the Court Reporter read that to us.

Mr. McKevitt: I don't want to trespass on the time of the Court but I want to have that issue cleared.

The Court: You go ahead and ask your question.

Q. Is it not a fact that on November 11, 1951, the maximum of a freight train such as 6015, under any conditions on that line, was thirty miles an

(Testimony of Merle C. Maury.)

hour, freight train? A. Yes, sir; I think so.

Q. Is it a fact, is it not?

A. Yes, sir; they have restrictions all up and down that branch.

Mr. Shone: We will agree on that.

Mr. McKevitt: If it agreed that there was a maximum speed, under any conditions, of thirty miles an hour on that line for that type of train we will not pursue it further, on that date, under any conditions.

Mr. McKevitt: No further cross-examination.

Mr. Shone: The Plaintiff now rests, your Honor.

The Court: I have a question of law to take up with counsel and I will excuse you ladies and gentlemen of the Jury until 10 o'clock tomorrow morning. [169]

MOTION FOR DIRECTED VERDICT

Mr. McKevitt: The Plaintiff having rested, the defendant now challenges the sufficiency of the evidence to sustain the material allegations of the complaint with reference to the alleged negligence of the Defendant Railway Company, and moves the Court to direct the jury to return a verdict in favor of the defendant and against the plaintiff. The allegations of negligence are specifically recited in paragraph five of the complaint and they are twelve in number.

1. "Failure to provide A. E. Mely a safe place to work." I know of no evidence here that would justify submitting that issue to the jury. Of course

we all know that is a catch-all phrase, there isn't a suit that Mr. Shone brings or anybody brings against the Railroad Company that they don't allege that.

2. "Failure to provide and supply safe and adequate equipment." That goes out under their own testimony.

3. "Running and operating Train Number 6015 on its line without a sufficient number of cars in it so equipped with power or train brakes that the Engineer on the Locomotive drawing such train could control its speed without requiring brakemen to use the common hand brake for that purpose." I don't think I need to belabor the Court with the proposition that there is no evidence on that [170] issue.

4. "Running and operating train number 6015 on its line without coupling the air hose." Mr. Shone admits that is out.

Mr. Shone: I will admit that you are right on 2, 3, and 4, so far.

5. "Running and operating train number 6015 on its line without connecting the air between engine No. 6015 and the cars following in said train." Do you agree that may go out?

Mr. Shone: I agree.

6. "Instructing engineers on its line to disregard Company rules while proceeding through its station yards." Do you agree that it out?

Mr. Shone: I submitted no instructions on any one of those.

7. "Compelling engineers on its line to proceed

according to time schedule, regardless of Company rules.”

Mr. Shone: That’s out.

8. “Allowing train number 6015”—excuse me, strike that—“Allowing train number 1648 to stop on a sharp, blind curve for switching purposes, well knowing the schedule and exact arrival of train number 6015 at the place where the collision occurred.” There isn’t a scintilla of evidence here to support the statement that Feehan, in charge of that train, knew the schedule of 6015. There is no schedule introduced in evidence and the evidence [171] of the plaintiff is that 6015 was a non-scheduled train.

9. “Failure to provide and equip its railroad system at the place of collision with a signal block system to warn plaintiff’s decedent of the voluntary obstruction ahead, as herein alleged.” Do you contend that we were negligent in not having block signals at that point and that it is a jury question?

Mr. Shone: It is a matter that the jury may take into consideration.

The Court: There is no use to make any argument here. Get your motion in the record.

10. “Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged.” Under the rules introduced here and read into the record, that failure on the part of the Railroad Company could only have been the failure of Mr. Feehan to instruct his flagman or crew to go back and place torpedoes and signals and so forth. We claim that there is no evidence here that he was required to do that.

On the contrary, their evidence is to the effect that he was not required to do it.

11. "Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision." [171-A] What was said with regard to number ten would be equally applicable to 11.

12. "Failing to properly protect train number 1648 while it was in such obscure position aforesaid, and in failing to properly protect train number 6015 from colliding therewith by notice, signal, warning, flares, orders, or any kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track." That could only be bottomed on the proposition that there was a rule violation of the rules of this Company, and that rule violation could have only been on the part of Eddie Feehan and there is no evidence of any character, substantial or otherwise, to indicate that he violated his duty in that regard. With reference to the evidence allowed by the Court having to do with the question of whether or not there was a violation of the rules—rules 99, 101 and 108—we believe that the overwhelming weight of the evidence is to the effect that the rules did not apply to these trains in question and we feel the unfortunate tragedy that brought about the death of these three men was due to the failure of Engineer Mely to have his train under control and to operate it at a speed and under control so that when that caboose came into vision

so it could be stopped and that it was his negligence and his negligence alone. [172]

The Court: I will overrule the motion but the Court will withdraw certain of the counts, or allegations set forth in the complaint, from the consideration of the jury. I am of the opinion that 1, 10, 11 and 12 are the only matters to be submitted to the jury. Is there anything further?

Mr. McKevitt: I am finished with my motion.

Mr. Shone: Nothing further at this time.

The Court: We will recess until 10:00 a.m.

October 1, 1952—10:00 A.M.

The Court: The motion to strike, if there was a motion to strike, if not the Court will withdraw from the consideration of the jury the allegations as to the acts of negligence numbered 2, 3, 4, 5, 6, 7, 8, and 9. One, ten, eleven and twelve to remain.

Mr. Shone: May the record show that the pleadings were not read to the jury?

The Court: Yes.

(Opening statement by Mr. Clements.)

STIPULATION

The Court: I might suggest to counsel that it appears to me that this matter might be shortened a great deal by a stipulation. I think that it has already been stipulated or understood that Mr. Mely was a competent Engineer and that he was well qualified; that he understood the rules; that he had passed examinations on them and was well quali-

fied. I see no necessity [173] of proving anything in that regard as far as Engineer Mely is concerned, and then I don't see any necessity of taking up any time in proving that these rules were adopted by these different railroads for the protection of the Railroad Company, the public and the employees. I see no necessity of taking any time to do that. Those are two matters that I think can readily be stipulated.

Mr. Shone: May I suggest another matter or two?

The Court: Yes.

Mr. Shone: Also, your Honor, we will agree to all that your Honor has stated as being true, and also it should be stipulated that Brakeman Brown was familiar with these rules and had passed examinations, because he was up in front with the Engineer. Mr. Reisenbigler has already testified that Brakeman Brown was familiar with the rules and had passed examinations on them.

The Court: I think we can go still further and say that all the employees on both trains——

Mr. Clements: Including Conductor Feehan.

The Court: Yes; that they were all familiar with the rules. That may be stipulated.

Mr. McKevitt: May we stipulate as to the map being introduced?

Mr. Shone: Yes; that the map may be [174] introduced as being properly made.

The Court: And that the measurements thereon are correct in all respects.

Mr. Shone: And that the photographs they have

offered here may be admitted as being correctly made and truly showing what they, each, depict.

The Court: Very well. That may be stipulated.

Mr. Clements: This map is Exhibit 22.

The Court: And the record shows that it is admitted.

J. P. TITUS

called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McKevitt:

Q. Will you state your name to the Court and Jury? A. J. P. Titus.

Q. How old are you? A. 35.

Q. Where do you reside?

A. Spokane, Washington.

Q. By whom are you employed?

A. The Northern Pacific Railway.

Q. How long have you been employed by that Company? A. Since 1940. [175]

Q. And your title?

A. Division Engineer of the Idaho Division and the Camas Prairie Railroad.

Q. Is the area here under discussion in your division? A. Yes, sir.

Q. Under your supervision? A. Yes, sir.

Q. You are familiar with it? A. Yes, sir.

Q. You have been over the track many times?

A. Yes, sir.

Q. In your official capacity? A. Yes, sir.

(Testimony of J. P. Titus.)

Q. Are you a graduate of a school of Engineering?

Mr. Shone: We will admit his qualifications.

Q. Mr. Titus, referring to Plaintiff's Exhibit 22, did you prepare that map? A. Yes, sir.

Q. What territory is embraced in that map?

A. The map starts at the east end of Bridge 126 near Arrow and continues through the yards and including Arrow Station—Arrow Depot and goes up on the Lewiston Branch of the Northern Pacific for approximately 1500 feet and on the Stites Branch of the Clearwater short line for approximately 1500 feet.

Q. Is that prepared to scale? [176]

A. Yes, sir; prepared to a scale of 1 inch to 100 feet.

Q. In other words, one inch on the map equals 100 feet on the ground? A. That's right.

Q. By the way, when we speak of east and west on the map what is the fact, are we referring to timetable directions or compass direction?

A. We are referring to timecard directions, which, however, are very close to compass directions. That is north (indicating) and this is east timecard direction.

Q. Beginning on the easterly end of the map, just point out to the jury if there exists a yard limit sign?

A. There is a yard limit sign exists here near mile post 125; engineering station on that is 6599 plus 62.4. I can explain that engineering station,

(Testimony of J. P. Titus.)

starting at Marshall, the beginning of the Palouse and Lewiston branch and every hundred feet is given a number, the first 100 feet away from Marshall is number 1.

Q. Marshall is just outside of Spokane?

A. Yes, Marshall is just outside of Spokane, and the Stations therefore run from east to west to Lewiston, the mile posts from east to west, this (indicating) is 124 and this 125 and 126.

Q. Now, you pointed out, did you, the first yard limit board?

A. This is the first yard limit board. [177]

Q. Is there any other sign east of that, that would advise the Engineer in charge of a train that he is approaching the yard limit?

A. Not east.

Q. West?

A. West, yes, the one mile warning board.

Q. Point to it on the map.

A. Here (indicating).

Q. What does that sign say?

A. Yard limit, one mile.

Q. To your knowledge was that sign there November 11, 1951?

A. To my knowledge—no, I don't know that it was there on November 11, but it was there on the 15th; when I made my survey.

Q. That was four days later? A. Yes, sir.

Q. Is that true of the yard limit board?

A. Yes, sir.

(Testimony of J. P. Titus.)

Q. Further east of the first yard limit sign are there other signs on the map?

A. East of the yard limit sign?

Q. Yes.

A. Well, there is a station, one-mile sign.

Q. Where is that?

A. It is located right here (indicating).

Q. What is the distance from the yard limit board to the [178] Station sign?

A. About 2300 feet.

Q. I notice here, Mr. Titus, will you explain to the jury what this is (indicating)—explain what that line indicates.

A. That line is the vision limit line from this point. It refers to the limit that you can see to the left. I might add that to the right is the Clearwater River. There is no sight restriction to the right but here (indicating) there is a bluff; after we drew the map we drew the line and there is a bluff coming close to this line, and we can see here what would be visible from this point.

Q. Mr. Titus, assuming that there was a train on the main track on November 11, 1951, up there at the depot; that the Engine was opposite the depot, the train having 85 cars, I believe, with a caboose to the west, where would the Engineer of a train going west first have a vision of those cars on that track, where would his point of vision begin?

A. Well, he could probably see that——

Mr. Shone: We object to the form of the ques-

(Testimony of J. P. Titus.)

tion; the witness has already testified that mathematically he would have a vision—now, whether he would have an actual vision because of any obstructions, I don't believe that this witness can [179] testify.

Q. Are you able to testify as to the actual vision you would have of those cars standing on the track as indicated on that date?

A. On November 15 I actually stood on the track and I could see——

Q. You stood where?

A. I stood on the track here, right at that sign, this yard limit sign, and I could see the location of the track in this vicinity.

Q. Now, Mr. Titus, you say, "in this vicinity," where are you pointing to on the map?

A. In the vicinity of mile post 124 and the vicinity of where the accident occurred.

Q. Is the point of collision shown on that map?

A. Yes, sir.

Q. Point it out to the Court and jury.

A. Here (indicating).

Q. Assuming that the boxcar was standing where the point of collision is indicated on the map, do you know of your own knowledge what view the Engineer operating the Diesel unit would have? What view he would have of the boxcar, and when would it first come into his vision, how far west of the point of collision?

A. Which boxcar?

Q. The caboose.

A. In reference to the fifteen cars on the siding

(Testimony of J. P. Titus.)

at the [180] time of the accident—the first point that caboose would come into view would be right here (indicating). This station is 6566 plus 23.6.

Q. What vision would he have, for what distance? A. 980.3 feet.

Q. 980.3 feet? A. Yes, sir.

Q. Then with reference to this Bluff, is there any indication as to the distance of some point near the bluff to the point of collision?

A. The bluff extends along quite a length of track—the east end of the bluff is at Station 6567 plus 30, at that point.

Q. How far is the east end of the bluff from the point of collision, did you testify to that?

A. No; I didn't.

Q. Will you please do so?

A. 1080 feet approximately. I can give it to you exactly.

Q. No. How many tracks are there in the vicinity of Arrow; there is the main line and what else?

A. At the Depot there is the main line; the Palouse and Lewiston and the main line on the Stites branch and there is one siding directly opposite the depot and a second siding east of the depot.

Mr. McKevitt: No further questions at this time. You may cross-examine. [181]

Mr. Shone: May I examine from the map?

The Court: Yes, you may.

Mr. McKevitt: May I ask another question or

(Testimony of J. P. Titus.)

two? Mr. Clements called my attention to another matter. I am sorry, Mr. Shone.

Q. (By Mr. McKevitt): I notice, Mr. Titus, on this map at different points you make certain reference, for instance, here is "Picture number 6," then there is "Picture 5, picture 4, picture 3, picture 2 and picture 1." Will you explain to the Court and Jury what those designations have reference to?

A. Those designations were locations of pictures that were taken during the test run as requested by the Interstate Commerce Commission. My duties there and all I did was to tie in the spacing and the location of the flags that were set out by Mr. Love of the Interstate Commerce Commission.

Q. Do you know where the pictures were taken from? Where was the camera?

A. In most cases the camera was in the cab of the locomotive.

Q. Does the map show how many pictures were taken, was it six or seven? A. Seven.

The Court: Are those pictures marked? [182]

Mr. Clements: Yes, they are now, your Honor. They are marked 26-1 to 26-7.

The Court: They may be admitted under the stipulation.

Q. You are handed defendant's Exhibits 26-1 to 26-7, inclusive. Will you kindly examine those photographs? A. Yes, I have.

Q. Now, Mr. Titus, take picture 26-1. Tell us—I

(Testimony of J. P. Titus.)

believe you said before that the camera was in the cab of the locomotive?

A. Yes, sir; it was in this case.

Q. Where was the picture taken from? You can refresh your recollection from the data on the picture if it is accurate to your knowledge.

The Court: Don't read the data out loud. Just refresh your recollection from it.

A. Picture number 1 was taken from just west of the yard limit sign; the yard limit sign shows in the picture.

Q. Are there any cars shown in that picture?

A. Yes.

Q. Showing you Defendant's Exhibit 26-2, you may refresh your recollection from the data there, do not read it out loud and then I will ask you a question. Is that Picture Tied in With the Map?

A. Yes, sir. [183]

A. This picture 2 is shown on the map taken from that location right there (indicating) which is station 6583 plus 01.6.

Q. Do you know what date this picture was taken?

A. This was on November 15, 1951.

Q. Are there any cars shown in that picture?

A. Yes.

Q. Where are those cars?

A. Those cars you can see from this location. I would rather not testify to that. I am not positive in my mind.

Q. Showing you Defendant's Exhibit 26-3, re-

(Testimony of J. P. Titus.)

fresh your recollection from that data. Is that picture shown on the map? A. Yes, sir.

Q. Point it out.

A. This picture was taken from the location shown as picture three, near the "station one mile sign," from the cab of the locomotive, the "station one mile sign" is shown in the picture.

Q. That picture, does it disclose any cars?

A. Yes, sir.

Q. Where are those cars standing?

A. This shows two groups of cars. It shows the 15 cars that was standing here (indicating) and another group of cars in this section, I am not sure of the number [184] of cars.

Q. Showing you Defendant's Exhibit 26-4, is that picture shown on the map? A. Yes, sir.

Q. Point out where 26-4 on the map is.

A. It is where picture number 4 is shown on the map, taken from the cab of the locomotive.

Q. What does it show?

A. Fifteen cars on this siding and it shows the corner—I think they call it the clearance flag on the caboose. You can see the corner of the caboose as placed in the test run.

Q. Where was the caboose standing?

A. The caboose was standing on the main line.

Q. When the test run was made?

A. When the picture was made.

Q. What is the distance from the point where the picture was taken to the caboose?

A. The distance at that point is 980.3 feet.

(Testimony of J. P. Titus.)

Q. Now, showing you Defendant's Exhibit 26-5, examine that, please. Where is that shown on the map?

A. That picture is on the map at location titled picture number five. That is taken from the cab of the locomotive and it was at the point at which the entire back face of the caboose was visible.

Q. What is the distance from where that picture was taken to the rear end of the caboose? [185]

A. 848.8 feet.

Q. Showing you Defendant's Exhibit 26-6, examine that, please. Now, is that shown on the map?

A. Yes, sir; that picture is shown on the map at location of picture 6. It was looking west from directly opposite the point that the caboose was set in the test run showing the test locomotive standing on the track.

Q. When the test run was actually made, however, was the caboose on the main line of the side track?

A. The caboose was on the side track when the test run was made.

Q. Why was the position changed?

A. Well, to avoid a second accident in case they couldn't get stopped in the distance they needed—they didn't want another accident.

Q. Now, the last one, 26-7, is that picture shown on the map?

A. Yes, it is shown on the location of picture number 7, which is taken from the side of the test

(Testimony of J. P. Titus.)

run Diesel locomotive showing the caboose setting on the siding. It was during the test run.

Q. Does that disclose the point where the Diesel in the test run stopped after the Engineer brought it to a stop? Does it show the caboose in front of the locomotive?

A. I can testify that is the point where the Interstate [186] Commerce Commission——

The Court: No, Mr. Witness, just leave the Interstate Commerce Commission out of this.

Q. Where is the front end of the engine so far as that picture is concerned?

A. Where it says picture 7 and the station is 6558 plus 82.1.

Q. And how far was that from the tail end of the caboose? A. 249 feet.

Judge Hiatt: Is that 249 feet from the Diesel to the caboose, as that picture shows?

Mr. McKevitt: That is the distance from the front end of the Diesel as used in the test run, after it came to a stop, the distance from the front end of the engine to the read end of the caboose.

Mr. McKevitt: You may cross-examine.

Cross-Examination

By Mr. Shone:

Q. Mr. Titus, will you give us the exact distance from the station house at North Lapwai to the station house at Arrow station?

A. May I refer to my notes?

Q. Yes, oh, yes, refer to your notes.

(Testimony of J. P. Titus.)

A. There is no station house at North Lapwai, there is a station sign. The distance from North Lapwai to the west end of the station at Arrow is 21,103.4 feet.

Q. That's just a little under four miles? [187]

A. Yes, sir.

Q. About 3.9 miles or something like that?

A. Yes, sir.

Q. There is 5280 feet to a mile?

A. That is correct.

Q. And how far from the station house was the caboose? A. At Arrow?

Q. Yes—to the caboose that was on the main line? A. 4800 feet.

Q. Now, will you tell us how many miles was travelled from North Lapwai to the point where the caboose was standing?

A. I can't tell you.

Q. You could deduct 4800 from the 21,103, couldn't you?

A. I could tell you the distance from the station sign at North Lapwai to the caboose.

Q. That's right, to where the caboose was. Give it in miles and fractions? A. 3.1 miles.

Q. Three and one-tenth miles?

A. Three and one-tenth miles from the sign at North Lapwai to the point of the caboose.

Q. Now, measure on the map and tell us the distance from the west switch west to the beginning of the first curve? A. About 42 feet. [188]

Q. In order to make that plain—going east as

(Testimony of J. P. Titus.)

this train was, when they came out of the last curve, completely out, the first unit of the Diesel, it was then 42 feet from the west switch?

A. That's right.

Q. And how far was it from the rear end of the caboose standing on the main line?

A. To the switch?

Q. Yes, and we have agreed that the caboose was 604 feet east of that switch. Does that measure out on the map? A. Yes, sir; very good.

Q. And what is that now?

A. It measures 603 feet. I would like to add here——

Q. Just a moment now—does the addition you are going to add have something to do with answering my question as to the number of feet from the caboose west to where that curve begins?

A. No, sir; it has nothing to do with the actual distance.

Q. And the actual distance is 603 feet?

A. Yes.

Q. Tell the jury what these little markings are on this map, these separate markings?

A. That is the fifteen cars on the siding.

Q. That siding is on the south side of the main line? A. That's right.

Q. And they are marked in little rectangles, are they not? [189] A. Yes, sir.

Q. To represent the boxcars? A. Yes, sir.

Q. Now, how far west on your map was the end of this west boxcar from the end of the caboose on

(Testimony of J. P. Titus.)

the main line? A. Approximately 350 feet.

Q. Now, in those photographs that we have just shown the jury, in any one of these photographs, or in all of them where cars are shown in the photographs, those cars were boxcars on the south siding, either the fifteen which we have just mentioned or some others on the siding south of the main line, further east? A. That's right.

Q. You have not attempted to explain to the jury that from any distance west, where these pictures were taken, you could see any hauling cars behind these boxcars? A. No, sir.

Q. That was hidden behind them?

A. No, sir.

Q. The cars that you see in these pictures are the cars in the siding, the day before, November 11, 1951? A. That's right.

The Court: We will take a recess at this time for 15 minutes. [190]

October 1, 1952—11:20 A.M.

Mr. Shone: Is it agreed here that this accident occurred at 11:10 a.m.?

Mr. McKevitt: That's right. And may we further agree that 6015 left North Lapwai at 11:04?

Mr. Shone: That is agreed.

Q. Are you familiar with the timetable?

A. It is not my job to be familiar with the timetable.

Q. Now, as an Engineer you know that a train travelling 30 miles an hour will make 44 feet per

(Testimony of J. P. Titus.)

second of time? A. That is right.

Q. And if it was going 60 miles an hour it would travel 88 feet per second of time?

A. That is correct.

Q. There is no dispute on that?

A. No, sir.

Q. And if Engineer Mely left North Lapwai at 11:04 he had 6 minutes in which to make the station at Arrow?

Mr. McKevitt: May I object to that as not proper cross-examination. I did not go into that on direct examination.

Q. Do you know or don't you know?

Mr. Shone: That may be improper cross-examination, your Honor.

The Court: I think it is.

Mr. Shone: I will withdraw the question. [191]

Q. Were you there when the test run was made?

A. I was there at the very completion of the test run.

Q. Did you have anything to do with the test run? A. No, sir.

Q. Nothing at all? A. Nothing at all.

Q. And you had nothing to do with the placing of the Diesel where it was going to start to make the test run? A. No, sir.

Mr. Shone: That is all.

Mr. McKevitt: That is all.

KENNETH A. BOX

called as a witness for the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. McKevitt:

Q. State your full name.

A. Kenneth Arthur Box.

Q. How old are you? A. 44.

Q. Where do you reside?

A. Tacoma, Washington.

Q. Prior to going to Tacoma, where did you reside? A. Spokane, Washington.

Q. By whom are you employed? [192]

A. By the Northern Pacific Railway Company.

Q. How long have you been employed by that Company? A. 18 years.

Q. In what capacity are you employed at the present time? A. Train Master.

Q. In what capacity were you employed on November 11, 1951? A. Train Master.

Q. In what Division?

A. Idaho Division.

Q. That includes the P & L branch?

A. Yes, it does.

Q. What are the duties of a train master?

A. Supervising the train movements, station employees, and all duties that the superintendent of the division delegates to you.

Q. Did you know Engineer Mely?

A. Yes, I knew Mr. Mely.

Q. Did you know the other members of the crew of 6015? A. Yes, I knew them all.

(Testimony of Kenneth A. Box.)

Q. Did you know the members of the crew of 1648? A. Yes, sir.

Q. Did you know the crew members of 1648?

A. Yes, I knew them.

Q. Under whose supervision, on that date, were the crew members of 6015?

A. Under my supervision. [193]

Q. Directly? A. Yes, sir.

Q. Mr. Box, are you familiar with the Consolidated Code of Operating Rules and General Instructions that controlled train movements on the P & L branch on November 11, 1951?

A. I am.

Q. Are you particularly familiar with what is known as rule 93? A. I am.

Q. Are you particularly familiar with what is known as rule 99? A. I am.

Q. Do you know what kind of a train 1648 was?

A. Yes, sir.

Q. By the way, did you go down to the scene of the accident? A. Yes, sir.

Q. Where were you when it happened?

A. In my home in Spokane.

Q. Within what time did you arrive at the scene of the accident?

A. Probably three hours later—three hours and a half later.

Q. Did you arrive by automobile?

A. Yes, sir.

Q. Did anyone go with you?

A. Mr. Murphy and Mr. Smith. [194]

(Testimony of Kenneth A. Box.)

Q. Who is Mr. Murphy?

A. Mr. Murphy is Master Mechanic for Northern Pacific at Parkwater and Mr. Smith is Road Foreman for Northern Pacific at Parkwater.

Q. Road foreman of what? A. Engines.

Q. Are you able to tell us whether this collision occurred within or without yard limits?

A. It occurred within yard limits.

Q. Are you familiar with the class of train 1648? A. It was an extra train.

Q. And was 6015 an extra train?

A. It was an extra train, yes.

Q. Now, within yard limits, how may the main track be used with respect to extra trains?

A. You may use the main track within yard limits, not protecting against extra trains.

Q. Without protecting?

A. Yes, without protecting.

Q. Have you an opinion, based upon your knowledge of these rules, and your experience as a railroad man, as to whether or not rule 99—just answer this yes or no—had any application to Conductor Feehan's train? A. Yes.

Q. What is that opinion?

A. It has no application to the case in [195] question.

Q. What does it apply to?

A. It applies to trains—the movement of trains outside the yard limits.

Q. Now, on November 15, 1951, were you at the vicinity of Arrow? A. Yes, sir.

(Testimony of Kenneth A. Box.)

Q. Was there a test run made that day?

A. Yes, there was.

Q. Did you take part in that test run?

A. I did.

Q. What equipment was used to make that test run?

A. A Diesel Electric Engine, the same class that was involved in the collision at Arrow on November 11, and 15 loaded cars—boxcars, the same number of cars that was in the train on November 11?

Q. Was a caboose used?

A. We had no caboose on this string.

Q. Was the Diesel that was used in that test run identical in every way with 6015?

A. The same class engine, bought at the same time.

Q. What was the purpose of making that test run?

A. To determine visibility and braking distances.

Q. And just tell the Court and jury how that test run was set up.

A. On November 15th, we had 15 loaded cars placed on the west end of the passing track at Arrow, which was in the same position that the fifteen cars were in on [196] November 11. We had a work train at Arrow handling a wrecker, finishing cleaning up the wreckage. We had this work train spot its caboose on the main line in exactly the same spot that Mr. Feehan's caboose was on, on November 11th. They were identical cabooses, both Union Pa-

(Testimony of Kenneth A. Box.)

cific cabooses painted bright yellow. We took this Diesel locomotive—the same class—we had Mr. Walters, Mechanical Superintendent of the Camas Prairie, and Mr. Love, Mr. Croon, myself, Mr. Turner, Engineer on the Camas Prairie, and Mr. Terry, Fireman on the Camas Prairie, and Mr. Al Munson, commercial photographer, from Lewiston, Idaho, all in the cab of the engine——

Q. Let me stop you there; how many in that cab—let's see—you had six——

A. There were eight.

Q. Was there room in the cab for all of you?

A. Oh, yes.

Q. No, go on.

A. On leaving Lewiston, we proceeded east-bound, that would be our timecard direction toward Spokane, to Lapwai and on through North Lapwai; on crossing the Clearwater bridge we started to looking for the first point where we could see the passing track at Arrow Station with these fifteen cars——

Mr. Shone: Now, if you will pardon me, if you are going into the effect of this test run, [197] and I assume you are—of what the test run was, we are objecting to any testimony of any test run being given by this witness, on the ground that no proper foundation has been laid for the introduction of any test run, or any such testimony, and before going any further I would ask permission of the Court to cross-examine this witness if he is about to tell what this test run amounted to.

(Testimony of Kenneth A. Box.)

The Court: You may cross-examine him.

Mr. McKeivitt: Now, your Honor?

The Court: Right now, yes.

Cross-Examination

By Mr. Shone:

Q. Mr. Box, you said that on this test run you had fifteen loaded cars? A. Yes, sir.

Q. What were they loaded with?

A. Lumber.

Q. The fifteen loaded cars that Mr. Mely was hauling, what were they loaded with?

A. So near as I recall, most of the cars were lumber, there could have been one or two cars of wheat on the train.

Q. What do you mean, "so far as you recall"?

A. So far as I know now. I did know at the time because I got the way bills.

Q. You had the way bills? [198]

A. Yes, sir.

Q. You say that they were the same type of cars—how do you know that?

A. They were all boxcars in Mr. Mely's train and they were all boxcars in the train we handled.

Q. Was the lumber that was placed in these cars the same type of lumber or the same kind of lumber that Mr. Mely was hauling? A. I don't know.

Q. Do you know the weights of the cars with lumber in them, that he was hauling?

A. I know the weight of the entire train that he was hauling but not the individual cars.

(Testimony of Kenneth A. Box.)

Q. Do you know the weight of the train that you were in the test run?

A. It was estimated weight.

Q. Do you know the weight? A. No.

Q. This estimated weight was just somebody's opinion of what it was, is that right?

A. That is correct.

Q. You had the correct weight of Mr. Mely's train as a whole?

A. The way-bill weights.

Q. But you knew the weight of the cars, did you not? A. That's right.

Q. And you knew the weight of the Diesel [199] units? A. Yes.

Q. But on the test train, on this test run you didn't know the weight of the whole train nor of the individual cars as loaded?

A. Those cars had—

Q. Answer my question whether you knew it or not? A. No, I didn't know it.

Q. And in the run that Mr. Mely was making he did carry a caboose? A. That is correct.

Q. And you didn't have any caboose on this test run of yours? A. That is correct.

Q. Do you know the weight of the caboose?

A. I know what cabooses weigh yes.

Q. What do they weigh?

A. 18 and 22 tons.

Q. 18 tons. A. 18 and 22 tons.

(Testimony of Kenneth A. Box.)

Q. Now the Diesel unit—you say that it was the same kind of Diesel unit Mr. Mely was operating—was it of the same weight?

A. Insofar as I know it is of the same weight?

Q. Do you know if it is the same weight or not?

A. No, I don't know.

Q. Do you know whether or not the Diesel units in this test run had the same amount of mileage in each unit as [200] Mr. Mely's Diesel had?

A. No, sir.

Q. You don't know that? A. No, sir.

Mr. Shone: Now we will repeat our objection that there is no proper foundation laid for a test run, and this witness has clearly shown that no proper foundation is laid and he is not competent to testify to a test run made under similar circumstances as existed at the time Mr. Mely had this collision.

The Court: The objection will be sustained.

Direct Examination
(Continued)

By Mr. McKevitt:

Q. You used the word "estimated" in referring to the test run, what do you mean by that?

A. All cars have an estimated weight until they go through a terminal where they are weighed and then they are actually put over the scales and weighed.

Q. Under that definition then, what was the estimated weight of the test run train?

(Testimony of Kenneth A. Box.)

Mr. Shone: We object to the estimated weight, your Honor, unless it was put over a terminal and weighed, not only of the cars but of the load that that the train contained so as to equal the load that Mr. Mely had on the train behind him.

The Court: The objection will be sustained. [201]

Q. How is the weight of the test train estimated?

A. We had the way-bill weights, those cars came off the Clearwater branch line.

Q. The cars in the test train?

A. That is correct. There is no chance to weigh them up there. They come in to Arrow and the cars moving east are taken into Spokane and weighed at Spokane, that gives the correct weight of the lading and the car—the car weight is stenciled on the car.

Q. Are you able to tell us whether the box cars in the test run were the same or similar to the box cars in the Mely train?

A. They were the same type of cars, the general run of cars and looked like about the same kind of train.

Q. You saw the Mely train on the day of the accident didn't you? A. That's correct.

Q. You referred to way-bills, did you see the way-bills on the Mely train? A. Yes, sir.

Q. Then you know the weight of the Mely train?

A. 971 tons.

Q. Within your knowledge, was the weight of the test run train substantially the weight of the Mely train?

(Testimony of Kenneth A. Box.)

Mr. Shone: We object to that as not a question for which a proper foundation was laid. [202] No foundation for this man's testimony supporting a test run—as to what the word substantial means—it is a relative term and a variation of many tons could exist. Further, this witness has already testified that there was no caboose on this particular train that made the test, and that the caboose weighed some 18 to 22 tons. I think it is common knowledge and the Court would take judicial knowledge or notice if you are going to make a test such as this the test should be made as a true test and particularly as to weight.

Mr. McKevitt: I will go into the question of weight, your Honor, with reference to the factors, if any with reference to braking distance.

Q. Can you advise us on that Mr. Box?

Mr. Shone: We further object on the ground that the witness has already testified that he did not weigh these cars after they were loaded.

The Court: The objection will be sustained.

Q. You stated that you had the weight of the Mely train—the cars on the Mely train as taken from the way-bills? A. That is correct.

Q. Now, do you know whether or not the 15 cars that were in the test train, I am speaking not of the loads, but the weight of the cars, did the cars themselves weigh the same as the cars in the Mely train? A. You mean empty cars?

Q. Yes? [203]

A. No, I couldn't say that they do.

(Testimony of Kenneth A. Box.)

Q. That they do or do not weigh the same?

A. I couldn't say they do or do not weigh the same, the cars vary.

Q. Is that information available in written form? Can we procure that so far as the test train is concerned?

A. I think you can.

Mr. McKevitt: At this time I will have to withdraw the witness until the information is furnished. I was going to pursue the question.

Q. With reference to making the test run is it the weight of the train or is it the length of the train that is important?

Mr. Shone: We object to that as not proper examination of the witness. I think the Court has some information on that at this time in regard to this test run. I don't see where the weight of the cars would have any material effect on his testimony unless he could give us the weight of those cars loaded equaling the weight of the Mely train. Evidently the weight of the cars would be immaterial here because he has already testified that he had no caboose would be 18 to 22 tons more in weight on the Mely train.

The Court: I will excuse this jury until 1:45. The jury may retire. [204]

(In the absence of the jury.)

The Court: I will state to counsel that it has always been my impression that an arrangement of this kind would be inadmissible as evidence. In other words, the staging of an occurrence that hap-

(Testimony of Kenneth A. Box.)

pened in the past, that such evidence, having been acted out, as this was done, would not appear to be admissible. Of course, the Plaintiff, and no representative of the Plaintiff being present at this test run, there would be no way of contradicting anything that was done of said, and no doubt this demonstration was made for the purpose of litigation, made for the purpose of obtaining evidence for some hearing or litigation pending, and I would like to hear your authorities for doing this.

Mr. McKevitt: I understand this is apart from Mr. Shone's objection.

The Court: Yes—you go about doing this, you go out and stage a matter of this kind in the absence of the interested parties who are litigants in this case and attempt to introduce it in evidence here.

Mr. McKevitt: I haven't any authorities at the present time.

The Court: I know there is a great deal of authority, both ways, on the question of putting a certain person in a certain place of position to see what he could see. I had a case—I don't [205] know whether you were in that case or not—where we had a car put on the track in the position that they claimed the car was on, on the track, and stationed another man up on the road to see whether he could see that car on the track, and if I remember, the weight of authority was that could not be done. There was some authority that it could be done. I am interested in seeing that this case is

(Testimony of Kenneth A. Box.)

properly presented and in the absence of the jury I will say that I am not very much in accord with staging a showing of this kind and then presenting it to the jury.

Mr. McKevitt: I do wish to disabuse your Honor as to any idea that this test run was conducted by the Northern Pacific Railway Company, anticipating any litigation—that is not the fact. We made that test run because we were instructed to make it, by a very high authority.

The Court: Yes, I understand, but it was made with the idea in mind that it would have to be presented to whoever instructed you to make it. Just as if the Court ordered you. I take it that you have some authority.

Mr. McKevitt: No, your Honor, to be perfectly frank with you, I assumed that such a showing was all right. I will say that I know now that I should have been prepared on the legal phase of this matter. [206]

(Argument of counsel.)

The Court: Mr. Clements stated that in his opinion this evidence would be admissible, that is, as to this test run, insofar as the visibility was concerned. That's already in evidence here in connection with the pictures as stated by Mr. Shone. I don't see how it would be too objectionable to permit this witness to testify as to what the vision was when they were making the test run, if it was limited to that.

(Testimony of Kenneth A. Box.)

Mr. Shone: I would have no objection to that.

The Court: That is all right, and if counsel wants to go ahead with this witness and offer testimony as to the visibility feature of this test I will permit that.

Mr. Shone: But not as to the stopping of the train.

The Court: No.

Mr. McKevitt: And if I am able to satisfy myself and in turn satisfy your Honor as to the other phase of it, I presume that I may do so later.

The Court: Yes, you may. We will recess until 1:45.

October 1, 1952, 1:45 P.M.

Q. Mr. Box, in addition to the duties of your office as a train master, do you have a [207] profession? A. Civil Engineer.

Q. I believe you stated that you were present—I will ask you, were you present when certain pictures were taken? A. Yes, sir.

Q. Could you, by taking certain pictures, in conjunction with this map, testify to distances between the front end of the Diesel and the rear end of the caboose and the other objects on the track? A. Yes, sir.

Mr. Shone: In order to save time, the Plaintiff is willing to admit that the testimony of the Engineer who was previously on the stand and testified as to where these pictures were taken and marked on the map—we will admit that that testimony is correct?

(Testimony of Kenneth A. Box.)

The Court: That might save some time.

Mr. McKevitt: That is satisfactory.

Q. Now, when you got down to the scene of the wreck, did you observe conditions generally there?

A. Yes, sir.

Q. Was there any portion of 6015 off the track?

A. The two head units were off the track.

Q. That would be the D and the C units?

A. The way it was operating then, it would be, yes.

Q. Do you have any knowledge with reference to the other train as to the number of cars that were derailed or demolished, or both?

A. The caboose and eight log flats were [208] demolished.

Q. That's on Feehan's train?

A. Yes, sir, on Mr. Feehan's train.

Q. Mr. Box, showing you defendant's exhibit 27 marked for identification—are you able to tell us what that instrument is?

A. That is the speedometer tape removed from diesel 6015 November 11, at 5 p.m.

Q. Where? A. At Arrow.

Q. Is there writing to that effect on the tape?

A. There is.

Q. In whose handwriting is that?

A. My handwriting.

Q. Is your signature on there?

A. My signature is on here.

Q. Are there signatures of any other individuals there?

(Testimony of Kenneth A. Box.)

A. J. A. Smith Road Foreman Northern Pacific Railway; E. E. Cash, Supervisor of Maintenance, Camas Prairie Railway; J. F. McManus, Assistant Supervisor of Maintenance Camas Prairie Railway; R. E. Murphy, Master Mechanic Northern Pacific Railway.

Q. Were these signatures put on there by these various individuals in your presence?

A. Yes, they were.

Q. Was your signature put on there in their presence? A. Yes, sir. [209]

Q. Was the signature of each man put on there in the presence of the others? A. Yes, sir.

Q. Where was that tape taken from, if you know?

A. That was removed from the speedometer of 6015 on November 11th, 1951, at 5 p.m. by Mr. R. E. Murphy, Master Mechanic.

Mr. McKevitt: That is all.

Cross-Examination

By Mr. Shone:

Q. Mr. Box, about what time did you arrive at the scene?

A. Approximately 4 p.m. we drove down from Spokane.

Q. Was there a work crew ahead of you, present on the ground? A. They hadn't arrived yet.

Q. Others were ahead of you?

A. None of the Northern Pacific men—the Camas Prairie men had gotten there.

(Testimony of Kenneth A. Box.)

Q. Did you ever work on that line?

A. Yes, sir.

Q. Did you ever work as an engineer, fireman or a crew man? A. No, sir.

Q. You just worked as train master?

A. Yes, sir.

Q. You have been over the road a great many times? A. I have.

Q. Now, this extra 6015 is that what you call a first [210] class train or a second class train?

A. It is an extra train.

Q. Is it classed as either a first class or second class? A. No, sir.

Q. Neither one? A. No, sir.

Q. Just known as an extra?

A. That is correct.

Q. Now, in approaching the yards—you have plaintiff's exhibit 11—in approaching the yard at Arrow and to the west of the west switch, which I assume you are familiar with, near where the collision occurred?

A. I am familiar with the switch, yes, sir.

Q. It is the switch west of the south siding?

A. You mean the switch at the west end of the siding.

Q. Yes, known as the west switch. A. Yes.

Q. You are familiar with that?

A. Yes, sir.

Q. Now, just west of what is known as the west switch is a curve with a high embankment, you are familiar with that curve?

(Testimony of Kenneth A. Box.)

A. There is a curve there.

Q. You have exhibit 11, which is a photograph—is that a photograph of that curve?

A. I wouldn't be able to say from this photograph. [211]

Q. You wouldn't be able to say from that?

A. There is nothing here to orient a man positively as to where it was taken.

Q. Now, passing to you exhibits—first, exhibit 26-3 are you familiar with that photograph?

A. Yes, sir.

Q. Have you seen it before? A. Yes, sir.

Q. Where?

A. It has been in our files since they were taken.

Q. Where do you keep your files?

A. We have our files in the Superintendent's office in Spokane and the General Manager's office in Seattle.

Q. Have you gone over the picture in Mr. McKeVitt's office? A. Not in his office.

Q. Or in his room?

A. I have seen these pictures, I have seen the file.

Q. Have you seen them in Mr. McKeVitt's room? A. Yes, sir.

Q. Here is Moscow? A. Yes, sir.

Q. And other members of the N P were present looking at those pictures?

A. I think there were others present, yes, sir.

Q. And in that picture the photographer was

(Testimony of Kenneth A. Box.)

directing the camera in an easterly direction toward that curve? [212]

A. That would be east, time-card direction, yes, sir.

Q. It was shot in the same direction as 6015 would be going on November 11, 1951?

A. That is correct.

Q. That curve, from the position where the camera man was sitting on the diesel engine—can you see around that curve?

A. No, there is a spot in there that you can't see the track.

Q. That you cannot see the track?

A. That is correct.

Q. That's within the yard limits of Arrow station?

A. That is correct.

Q. Now, assuming that a crew, a railroad crew, had stopped a caboose just around that curve for some reason, good or bad—what would have been their duty if they knew or could reasonably appreciate that another train was following them, under the rules of the Company?

A. We are assuming this is inside yard limits.

Q. It is inside yard limits?

A. They have no obligation to go back and protect themselves inside yard limits.

Q. Now, what would an ordinary, reasonable, competent employee of the railroad do under the circumstances that I have given you?

Mr. McKevitt: I am going to object to that,

(Testimony of Kenneth A. Box.)

if your Honor please, it is based on something not in evidence. [213]

The Court: That would be a matter for the jury to determine.

Mr. Shone: That is right, I withdraw the question.

Q. Now then, you say that under the rules, there would be no obligation for the employee, for any flagman or any employee on that train with the caboose back around that curve, to go back and put two torpedoes on the rails to warn oncoming trains, or following trains?

Mr. McKevitt: We object to this as immaterial——

The Court: ——That would be a matter for the jury to determine under the evidence now before them.

Mr. Shone: That is all.

Mr. McKevitt: That's all.

Mr. Clements: At this time the defendant offers in evidence defendant's exhibit 25 which has been identified and I understand there will be no objection.

Mr. Shone: No objection.

The Court: It may be admitted. What is that?

Mr. Clements: It is time-table 94 which was referred to yesterday. Now, I have several photographs and they have been marked for identification—counsel for both sides—each of these, your Honor, has a notation of where the picture was taken and counsel for the plaintiff agree with us,

that I may read the notations into the record and I will then introduce the picture [214] and the notation is to be removed from the face of the picture.

The Court: That is agreeable with the Court. You may proceed.

Mr. Shone: Yes, it is agreeable with the plaintiff.

Mr. Clements: I now offer defendant's exhibit 13, bearing the notation "camera facing southwest from the highway.

Mr. Shone: No objection.

The Court: It may be admitted, the clerk will mark it and it may be handed to the jury.

Mr. Clements: Defendant's exhibit 14 is view number 2, with notation "camera facing southwest from pasture north of main track." Defendant's exhibit 15 view 3, "facing west from point north of main line." Defendant's exhibit 16, which is view 4, "camera on X-6015-E facing east on main track." Exhibit 17, view number 5 which is "camera between tracks facing eastward." Defendant's exhibit 18 which is view number 10 "camera on top of loads on passing tracks, shows rear end of logging flats standing on main track. Exhibit 19 view 11 "another view from top of 15 loads on passing." Defendant's exhibit 20 is view 13 "camera between tracks facing westward with main track to right in view." Defendant's exhibit 21 is view number 12, "camera north of main track showing [215] D unit."

The Court: They are all admitted and they may be handed to the jury.

F. A. GRANGER

recalled as a witness for the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. McKevitt:

Q. You are the same Mr. Granger who has already been on the stand and you have been sworn?

A. Yes, sir.

Q. Mr. Granger, how long have you been a conductor for the Northern Pacific?

A. Since 1917.

Q. Continuously? A. Yes, sir.

Q. Have you ever acted as passenger conductor?

A. No, sir.

Q. Always freight service? A. Yes, sir.

Q. Have you ever acted as conductor on the train that Eddie Feehan was conductor on on November 11, 1951? A. Yes, I have.

Q. Is that known as the Stites local?

A. Yes, sir.

Q. What is the fact as to whether or not during the period of time that you conductor you were periodically examined [216] on the rules?

A. Yes, sir.

Q. Those examinations were for the purpose of determining, first, your acquaintance with the rules, and if you had that acquaintance from time to time or had forgotten them, is that true?

A. Yes, sir, that is true.

Q. Are you familiar with rule 99?

(Testimony of F. A. Granger.)

A. Yes, sir.

Q. In your opinion did that rule control any action of Mr. Feehan on that date?

A. No, sir.

Q. Do you know what rule 99 applies to?

A. Yes, sir.

Q. What is it?

A. If you are delayed outside a yard limit board that you will immediately protect the rear end of your train.

Mr. McKevitt: You may inquire.

Cross-Examination

By Mr. Shone:

Q. Mr. Granger, when, as Feehan's train was stopped within the station yards, if it was obscured by the station from an engineer of an overtaking freight train or any train that would be coming into that station or after coming in, what would be his duty under rule 99?

A. He would not have to flag within yard limits.

Q. Would he have to put out torpedoes? [217]

A. No, sir.

Q. If he were in yard limits, on a curve and on a curve with a deep cut, embankments on both sides and his caboose was stopped inside that curve and inside that cut, and he knew or could expect a train following him, would he be obligated under the rules, to put out torpedoes to protect his train and the oncoming train?

A. No, sir.

Q. He would not.

(Testimony of F. A. Granger.)

Q. Would you, as a conductor, if your caboose was obscured from the vision of an engineer of a following train, would you, as a conductor, order torpedoes put out? A. I would not.

Mr. Shone: That is all.

Redirect Examination

By Mr. McKevitt.

Q. You are speaking of within yard limits?

A. Yes, sir.

Mr. McKevitt: That's all.

R. E. MURPHY

called as a witness by the Defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Clements:

Q. Mr. Murphy, where do you reside?

A. Spokane, Washington.

Q. How old are you Mr. Murphy? [218]

A. 61.

Q. What, if any, position do you hold with the Northern Pacific Railway Company?

A. Master Mechanic on the Idaho Division.

Q. How long have you been so employed?

A. As a Master Mechanic since April 1, 1949.

Q. How long have you been engaged in the railroad business? A. March 7, 1910.

Q. Just describe as briefly as you can the differ-

(Testimony of R. E. Murphy.)

ent kind of positions you have held with the railroad since the beginning of your railroad career?

A. I hired out as a fireman on the St. Paul Division on March 7, 1910; promoted to locomotive engineer November 7, 1917. In 1939 I was promoted to a road foreman on the Yellowstone Division and in 1942 I was transferred as a road foreman to the Fargo Division. In 1947 I was transferred from the Fargo Division to the Idaho Division at Spokane, and in 1947 I was promoted to a Master Mechanic.

Q. State briefly what the duties and responsibilities of a road foreman are?

A. The duties of a road foreman are to supervise the performance of the engine men and to see that they comply with the rules and instructions of the railroad and also they are responsible for the mechanical condition of the engine. [219]

Q. Briefly what is the duty and the responsibility of a master mechanic?

A. A master mechanic's duties are to know that the mechanical condition of all the engines operating on the Idaho Division is good, that all the engines are in good operating condition; also he has charge of the road foremen; the shops, round-houses, stationary plants, car department and he is also responsible to see that the men comply with the rules and instructions of the railroad.

Mr. Clements: I will admit that this next question is somewhat leading but I think it will save time.

Q. I assume that you are acquainted with the

(Testimony of R. E. Murphy.)

structure of diesel electric locomotive similar to 6015, a subject in this action? A. Yes, sir.

Q. You were acquainted with this particular locomotive were you? A. Yes.

Q. Do you know what those four units weigh, in tons?

A. Each unit weighs 115 tons and the four units weigh 460 tons.

Q. If I misstate what the fact was as to 6015 on November 11, 1951, being equipped with speedometer equipment—

A. —this 6015 on November 11, 1951, had a speedometer in each operating unit, that would be the A and the D unit. [220]

Q. When you say the A and D unit, you mean the driving ends of the unit? A. Yes.

Q. Now, are those speedometers connected up; with each other, when one functions does the other function?

A. Yes,—could I make an explanation on that?
The Court: Yes, you may.

Q. The speedometers are connected with the leading wheel of the A and D unit, whichever end it is being operated from.

Q. Now, that connection is what causes the speedometer to function and register the speed of the train? A. Yes, sir.

Q. Does the speedometer register the speed of the train in miles per hour? A. Yes, it does.

Q. And can you describe where that is situated and how it is within the Engineer's vision.

(Testimony of R. E. Murphy.)

A. As the engineer—and I might say that he sits in a seat similar to this, and it would be to his left just about the distance my hand is and it is at an angle facing him so that it is possible that he can see the speedometer without moving his head to take his line of vision away from the track ahead.

Q. Describe as near as you can from the position of the chair you are sitting in, where his throttle and his braking apparatus is? [221]

A. Now, I am about average height and I have measured it from where I would sit in the Engineer's seat. The throttle would be eighteen inches from his body and the brake valve is also about twenty inches.

Q. You say the brake valve, how is that controlled, is it controlled with a handle?

A. Yes, there is a handle there about eleven inches long.

Q. Is there just one handle for all of the braking equipment on 6015?

A. There are two handles, one is termed as the automatic brake valve, that applies the brakes on the engine and train both, and the small handle is what is known as the independent brake, that just applies the brakes on the engine.

Q. You can operate both those brakes from a sitting position, is that right? A. Yes.

Q. I hand you defendant's exhibit 27 marked for identification, will you please examine that and state whether or not your signature appears

(Testimony of R. E. Murphy.)

thereon? A. My signature is on this tape.

Q. Referring back to the speedometer that is on these trains is there any recording made of the speedometer while it is in action?

A. That is correct, these speedometers have a tape inside of a box that is locked. [222]

Q. And who has a key to the box?

A. Only the supervisors on the railroad; they have access to it to change tapes, and also the road foreman and master mechanic.

Q. Does the engineer or fireman or any member of the train crew have access to that tape?

A. No.

Q. What is done with that tape, if anything, at the end of each run?

A. This tape is taken off by the supervisor and he signs his name that he removed the tape and also the date and the engine number and the engineer that arrived on that particular train that this tape was removed from.

Q. Referring to exhibit 27 for identification, and you may examine the instrument,—when was the first time that you ever saw that tape.

A. The first time I saw this tape was at 5 p.m. at Arrow, Idaho, and this was taken off—

Q. What date? A. November 11.

Q. What year? A. 1951.

Q. Who took it off the train? A. I did.

Q. Who unlocked the box?

A. I did. [223]

Q. Has that tape been continuously in your possession since November 11, 1951?

(Testimony of R. E. Murphy.)

A. Yes, it has, outside of—

Q. —Don't say where,—if it was in the possession of any other official you don't need to name him or who he was connected with.

The Court: There is no question but what this tape was taken from that train, is there?

Mr. Clements: Then I will proceed faster. We now offer in evidence Defendant's Exhibit 27.

Mr. Shone: We would like to examine him on the exhibit before it goes in, your Honor.

The Court: I will admit it because I think we would just be taking up more time. You may cross-examine him on it later.

Mr. Clements: I will let him cross-examine him on that, there is no need of both of us doing it. If he doesn't examine fully, I would like to have the privilege of going into it later.

The Court: You go ahead and finish your examination. It is not my intention to stop anyone from getting their case in, but it seems to me we are taking up too much time. You finish with your witness and turn him over for cross-examination.

Q. Mr. Murphy, does that tap show the speed of that train for eight or ten miles prior to the time that the [224] speedometer quit functioning?

A. Yes, it does.

Q. Can you tell from that tape approximately when that train left East Lewiston? A. Yes.

Q. Will you please refer to the tape and then state from your interpretation of the tape, what rate of speed that train travelled according to that

(Testimony of R. E. Murphy.)

tape from East Lewiston on up; the track up to and including the point of collision?

A. When he left East Lewiston, from zero in the first mile he accelerated up to a speed of 27 miles an hour, then dropped for a mile and a half possibly, he dropped to 25 miles an hour and then he dropped from 25 in the middle of the mile to about 12 miles an hour—

Q. —How far was that?

A. A half mile in the next mile, and then the other half mile of that mile he accelerated up to a speed of 35 miles an hour and in the next mile he accelerated up to a speed of 40 miles an hour and about the next three and a half miles he travelled between 40 and 43 miles an hour and then the next two-thirds of a mile he dropped down to zero.

Q. Where does that get him now, in station names?

A. That is where he would make the stop at North Lapwai.

Q. Now, what does the speed show to and past Arrow Junction?

A. From the time that he started at zero at North Lapwai [225] he started at zero and accelerated to a speed of about 27 miles an hour, that would be in two-thirds of a mile and then he dropped down to 25 miles an hour in the next mile, then he accelerated from there to a speed of 47 miles an hour, then in about 1300 feet he dropped to zero.

(Testimony of R. E. Murphy.)

Q. 47 miles an hour was the highest rate of speed from North Lapwai on?

A. That is correct.

Q. Have you ever operated a diesel electric locomotive such as 6015? A. Yes.

Q. As an engineer?

A. As a road foreman of engines.

Q. Assuming that a diesel electric engine, identical in construction, capacity and mechanical fitness as 6051, was coupled to fifteen loaded box cars and a Union Pacific caboose with a total over-all train load of 1431 tons, and assuming that that said train was being operated on a track similar in construction and alignment as goes through the Arrow yard limit; assuming that track is of such a nature what when you pass the yard Board your vision is unobstructed to the track ahead for 4319 feet; further assuming that after you pass that yard board you make two curves of degrees from two to three per cent and being of such a nature as you go through one of these cuts that the engineer's view is temporarily obstructed [226] for 550 feet from the track clear around the curve; now, assuming that that train was operated at thirty miles an hour, what in your opinion,—or do you have an opinion as to the distance in which that train could be stopped, going at that speed, with an emergency application. Do you have such an opinion? A. Yes, I have.

Q. What is your opinion as to the distance within which that train could be stopped going at

(Testimony of R. E. Murphy.)

thirty miles an hour under the conditions I have outlined to you?

A. Between seven and eight hundred feet.

Q. That is an emergency application?

A. Yes.

Q. What is meant by a service application?

A. That is where the brakes are applied in making an ordinary stop.

Mr. Clements: I think that's all at this time.

Cross-Examination

By Mr. Shone:

Mr. Shone: If it please the Court,—I think all this handwriting should be eliminated, that has nothing to do with the tape. It was done after the tape was taken off.

The Court: Yes, I think so but I don't know how you are going to do it. Before it goes to [227] the jury we will figure out some way to eliminate it.

Mr. Clements: I have an idea if the Court would like to hear it.

The Court: All right.

Mr. Clements: I think the handwriting, itself, could, in the absence of the jury, be dictated into the record with the agreement that when the tape was introduced in evidence that it contained that endorsement.

Mr. Shone: That part has already gone into the record.

The Court: It doesn't make any difference, we will do something about it. It seems to me that this

(Testimony of R. E. Murphy.)

case has taken entirely too much time, and too wide a field, we are only interested in what happened at the time of the accident, we have taken this train from East Lewiston to North Lapwai and into the junction, and it seems to me the whole question is; what was the duty of the railroad company in stopping this train or giving some warning or having the train dispatcher advise them in regard to it and those things. All the other matters seem to me to be quite foreign to the question for this jury to decide. We are taking up a lot of time here. Maybe I am wrong and understand, I am letting you go ahead.

Mr. Shone: I will be very short with my cross-examination. [228]

Q. Mr. Murphy, the automatic valve and the independent valve, now, the independent valve just puts the brakes on the diesel units, is that right?

A. That is correct.

Q. And the automatic valve puts the brakes on what?

A. On the locomotive and the train, both.

Q. When the automatic valve is put on do the cylinders in all the cars respond at the same moment? A. No, I wouldn't say that—

Q. I am just asking, do they respond. In other words, when the automatic valve is put on to put it in emergency each car in the train goes into emergency, one at a time? A. That's correct.

Q. And the longer the train is the longer it takes to put the train into emergency?

(Testimony of R. E. Murphy.)

A. Yes, but that's only a matter of seconds.

Q. How many seconds?

A. For how many cars?

Q. Fifteen cars and a caboose?

A. Not more than three seconds.

Q. Then it always takes some time for an engineer to react and get into action when he comes upon an obstruction ahead? A. That's true.

Q. And the length of time it takes depends upon the individual, and how he reacts to a dangerous situation? [229] A. That's true.

Q. And that's common knowledge?

A. That's correct.

Q. Now, on the speedometer tape as introduced in evidence, that tape is made by a needle something similar to a barometer needle, is it not?

A. That's mechanically connected,—I don't quite understand your question.

Q. You have had a barometric reading, have you not, where a needle just draws a line on a sheet of paper? A. Yes.

Q. In the speedometer, when this recording is made, there is a needle in there that draws a line?

A. That is correct.

Q. What kind of needle is that, explain it to the jury briefly?

A. This is a pencil instead of needle, and this pencil is connected to a hand on the dial of the speedometer which the engineer sees so that the marking on the tape will correspond correctly with the reading on the dial that the engineer sees.

(Testimony of R. E. Murphy.)

Q. And if the unit went into a collision that pencil may jump in any direction during a smash-up? A. I wouldn't say that's correct.

Q. What would you say?

A. If this pencil jumped or was erratic it would mark it on the tape that it was erratic. I might give you an [230] explanation if you will accept it.

Q. That would be your interpretation. Have you interpreted these tapes quite often?

A. Yes, I check them quite often.

Q. How about the tape on the front unit, 6015 D?

A. I don't know, that unit speedometer was destroyed.

Q. How about the tape?

A. It evidently was destroyed?

A. No, because everything was destroyed from the collision and fire.

Q. Did you make any effort to recover the tape from that unit?

A. We looked to see but there was nothing there.

Q. You took it out of another unit, the A unit. The fourth one back? A. That is correct.

Q. You think a train going 30 miles per hour under the same conditions with the same load could be stopped in seven or eight hundred feet, in an emergency? A. Yes.

Q. And that stopping in seven or eight hundred feet, that would be where you actually go into emergency, from that point to the point of stopping?

A. That's correct.

(Testimony of R. E. Murphy.)

Q. And that is not allowing any time for reaction by the engineer or the reaction of the air to the air brakes on the cars?

A. That is correct. [231]

Q. You say fifteen second,—strike that,—three seconds for the air in fifteen cars and an unknown time for the engineer to react. That is a matter of how quickly an engineer does react?

A. That is correct.

Mr. Shone: That's all.

Mr. Clements: That is all.

The Court: We will take a ten minute recess.

October 1, 1952, 2:50 P.M.

The Court: Mr. Clements you had a couple of questions to ask the witness.

Mr. Clements: Yes, your Honor.

Redirect Examination

By Mr. Clements:

Q. Referring to the end of that exhibit,—what is the significance, in so far as the functioning of this tape is concerned, of these numbers starting at zero, 10, 20, 30, 40, 50, 60 and 70 and upward on this tape?

A. That would be the miles per hour.

Q. Now, what is the significance of these horizontal lines?

A. They are one mile for each space, each line is one mile and they are calibrated on two miles to the inch.

(Testimony of R. E. Murphy.)

Q. Where the pencil shows the recording, as the pencil goes up from the bottom of the tape, does that indicate the increase of the speed of the locomotive? A. Yes.

Q. And as it comes down it indicates the deceleration of [232] the speed or the decrease in speed? A. That's right.

Mr. Clements: That is all.

Mr. Shone: That's all.

Mr. McKevitt: The Defendant rests, your Honor.

The Court. Do you have any rebuttal.

Mr. Shone: The Plaintiff rests, your Honor.

The Court: The Court will be recessed, so far as the jury is concerned, until 9:30 tomorrow morning. The jury may now retire.

(In the absence of the jury.)

MOTION FOR DIRECTED VERDICT

Mr. McKevitt: If the Court please,—the Plaintiff and the defendant having rested, the defendant now renews the motion for a directed verdict as made at the close of the Plaintiff's case, and now moves the Court to instruct the jury to return a verdict for the defendant and against the Plaintiff, for the reason and upon the grounds that it has now been disclosed from all the evidence that the sole and proximate cause of this accident was the failure of Engineer Mely to comply with the operating rules and instructions of this defendant company, particularly rule 93.

It now appears conclusively that this failure on the part of Engineer Mely was the sole and proximate cause of the accident; for the reason that there has not been shown that any duty owed by the railroad company to Mr. Mely was violated in any particular and that his [233] negligence was the cause of his death and not any negligence on the part of the company.

The Court: The motion will be denied.

Mr. McKevitt: We now request the Court to withdraw from the jury's consideration subdivision one of paragraph five of the complaint, namely: "Failure to provide A. E. Mely a safe place to work," upon the ground that there is no evidence in this record to sustain such allegation.

The Court: I will overrule the motion.

Mr. McKevitt: For the purpose of the record the defendant moves the Court to withdraw from the consideration of the jury subdivision 10 of paragraph five, for the reasons and upon the grounds heretofore stated. The subdivision is: "Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged."

The Court: Denied.

Mr. McKevitt: The Defendant makes the same Motion with reference to subdivision 11 of paragraph five, "Failure to place men, flares, or signals to give warning of said obstruction of said track a reasonable distance from said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision." The

reason for that lies in the fact that there was no rule of the company in effect at that time that would require any action of that kind on the part of the conductor of [234] train 1648.

The Court: Denied.

Mr. McKevitt: The same motion with reference to subdivision 12 of paragraph five: "Failing to properly protect train number 1648 while it was in such obscure position aforesaid, and in failing to properly protect train number 6015 from colliding therewith, by notice, signal, warning, flares, orders, or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track." It is the position of the defendant that the physical evidence is to the effect that within 980 feet he could see a portion of and within 850 feet he could see the complete rear end of the caboose and therefore there was no obstruction of the track.

The Court: Motion denied.

Mr. McKevitt: As an addition to the motion for directed verdict, the defendant moves the Court to withdraw from the consideration of the jury any question of violation by the company of any of its operating rules, which issue was contained in an amendment permitted by the Court over the objection of the defendant, for the reason and upon the ground that there is no evidence that the company violated any of its operating rules and there is no evidence that the death of Engineer Mely was caused by any rule violation [235] by the company, its agents or employees.

The Court: Denied.

(Argument of counsel to Jury.)

Instructions

The Court: I want to say to you Ladies and Gentlemen of the jury, that this case has been presented by as fine and capable lawyers as ever appear before this Court.

This is a serious case, as all action are, and it is brought by the Plaintiff Tillie Mely, as Administratrix of the Estate of A. E. Mely, deceased, against the Northern Pacific Railway Company, a corporation, in which she seeks to recover of and from the defendant the sum of \$35,000.00 now reduced to \$33,900.00 because of the death of her husband A. E. Mely, alleged to have been caused by the negligence of the defendant company.

This action is brought under the Federal Employer's Liability Act.

It is alleged in the Complaint that the Plaintiff Tillie Mely is the duly appointed administratrix of the estate of A. E. Mely, and is now acting as such; it is also alleged in the complaint that the defendant is a corporation organized under the laws of Wisconsin and operating its railroad in the State and District of Idaho. [236] It is alleged that the defendant long prior to November 11, 1951, employed the deceased as an engineer and that on the 11th day of November, 1951, deceased was employed as an engineer on a diesel locomotive to work on freight trains, loaded and unloaded with freight, and being shipped and received by the defendant company in interstate commerce. The ownership of the railroad track, bed and right-of-way

is alleged to have been in the defendant company upon which the locomotive was being operated, it is further alleged that the deceased was the engineer on the defendant company's engine No. 6015 going East and it collided with a train of cars being hauled by Northern Pacific Railway Company Engine No. 1648. It is alleged that because of and by reason of the said collision the decedent was killed, and that said collision and death of the said deceased was caused by the negligence of the defendant company.

It is further alleged that the negligence of the defendant consisted of failure to provide A. E. Mely a safe place to work; failure to give A. E. Mely any warning of any kind of the obstruction or danger ahead. [237]

It is alleged that defendant was further negligent by its failure to place men, flares, or signals, to give warning of said obstruction of said track within a reasonable distance of said obstruction, so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision.

It is alleged that the defendant was negligent in failing to properly protect train No. 1648 while it was in such obscure position, to properly protect train No. 6015 from colliding therewith, by notice, signal, warning, flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said Main line track.

Plaintiff alleges that at the time of the collision the said deceased was operating train 6015 which

was at the time a through train which had the right of way on defendant's track.

It is alleged that said Engineer Mely had a life expectancy of 27 years and that he was capable of earning the sum of \$500.00 per month and that he, at all times gave to the plaintiff Tillie Mely financial support, the best of care, comfort and society and companionship, and that by reason of the death of said A. E. Mely this plaintiff Tillie Mely has been deprived of all financial support.

The defendant has filed its answer wherein it makes certain admissions and denials and also affirmative allegations. Defendant admits the corporate capacity of Northern Pacific Railway Company; admits the residence of the Plaintiff and that plaintiff Tillie Mely and A. E. Mely were husband and wife.

Denies all the other allegations of the plaintiff, that is, defendant denies that the plaintiff has been damaged in the sum of \$35,000.00, now reduced to \$33,900.00, or in any other amount by reason of the negligence of the defendant Company, and affirmatively alleges that the death of A. E. Mely was caused and brought about solely and alone through the negligence of the said A. E. Mely which negligence was the direct and proximate cause of his death.

It is the duty of the Court to instruct you as to the law governing the case, and you shall take such instructions to be the law. You shall consider the instructions as a whole and not pick out any particu-

lar instruction and place undue emphasis on such instruction.

You will also disregard any statement made by counsel on either side which is not sustained by the [239] evidence, and any evidence which may have been offered on either side and not admitted by the Court, and any evidence which after the admission was stricken by the Court.

The statements of the attorneys in the case, made at the trial and in their arguments, are not evidence and should not be considered by you as such.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received in the trial.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

The plaintiff, Tillie Mely, brings this action in a purely representative capacity, by reason of her being appointed administratrix of the estate of A. E. Mely, deceased.

The person she represents is alleged to be the kin of said deceased, that is Tillie Mely, the wife [240] of A. E. Mely, deceased. Tillie Mely is the real party in interest and in that sense is the real plaintiff in this case. It is compensation for the pecuniary loss suffered by her, if any, which plaintiff is en-

titled to recover if she is entitled to recover anything by this action; therefore, in considering the instructions given you on the measure of damages applicable to this case, you will regard Tillie Mely as the real party in interest and as the real plaintiff in this case, to the same effect as if she were so named in the complaint and in the instructions.

You are instructed that the defendant was not the insurer of Engineer Mely's safety. The plaintiff is not entitled to recover just because Mr. Mely was killed in the course of his employment. There is no presumption from the fact that his death occurred that it was caused by the negligence of the defendant. Before the plaintiff would be entitled to recover anything in this action, she must prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause, in whole or in part, of the death of her husband. [241]

The burden therefore is upon the plaintiff in the first instance to show by a preponderance of the evidence the cause of action set forth in her complaint.

By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight of the evidence. That is what the word preponderance means, evidence which convinces you that the truth lies upon this side or that it is that which is more convincing, more persuasive. The burden, therefore, is upon the plaintiff in this case to show that the defendant was guilty of negli-

gence in the respect charged in the complaint to which I have called your attention.

The testimony of one witness worthy of belief is sufficient for the proof of any fact in this case and would justify a verdict for or against either party in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness. [242]

The defendant Northern Pacific Railway Company is a corporation, and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It is admitted in the pleadings and therefore requires no proof that the two trains involved in the collision in question were the property of the defendant Northern Pacific Railway Company, and that they were in charge of, and being operated by employees and agents of the defendant, acting within the scope of their authority. Thus, their conduct shall be deemed by you to have been the conduct of the Northern Pacific Railway Company, a corporation.

“Negligence” is the failure to exercise reasonable and ordinary care, and by the term “reasonable and ordinary care” is meant that degree of care which an ordinarily careful and prudent person would

exercise under the same or similar circumstances or conditions. Negligence consists in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done [243] under the same or similar circumstances and conditions. Negligence is never presumed, but must be established by proof the same as any other fact in the case.

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the facts surrounding the circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another set of conditions; therefore, we ask: "What conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances?" Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

By the phrase 'reasonable care' or 'ordinary care,' as used in these instructions, is meant the exercise [244] of that care and caution as would be exercised by a reasonably prudent person under the existing circumstances.

'Ordinary' or 'reasonable' care are relative terms, and such care as is proportionate to, and commensurate with, the danger involved; in other words, the greater the danger involved the greater is the care required, although there is but one standard of care, and that is reasonable or ordinary care, as defined in these instructions.

Inasmuch as the amount of caution used by an ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended.

The proximate cause of a death is that which in its ordinary sequence, unbroken by any intervening cause, produces death, and without which, death would not have occurred. [245]

It is not incumbent upon the plaintiff to prove all of the acts of negligence alleged in her complaint to entitle the plaintiff to a verdict in this case, but if the evidence introduced is such as to satisfy you, by a preponderance of all the evidence herein, that one or more of said acts of negligence, so alleged, in whole or in part, proximately caused injury and death to engineer A. E. Mely, then your verdict should be for the plaintiff.

This case is based upon a statute of the United States generally known as the Federal Employer's

Liability Act which provides that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his personal representative, for the benefit of the surviving widow of such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

The Federal Act upon which plaintiff relies for a recovery in this case requires that before a plaintiff can recover she must first establish these things:

That the defendant was guilty of negligence as alleged in the complaint and that any such negligence was in whole or in part the cause of the decedent's death.

That the defendant railroad company was engaged in interstate commerce.

That a part, at least, of decedent's duties was in the furtherance of interstate commerce or directly or closely or substantially affected interstate commerce.

Failure of the plaintiff to establish either one of these elements prevents a recovery by her.

You are instructed, however, that the evidence here is undisputed to the effect that the Northern Pacific Railroad Company is a common carrier by railroad, engaging in interstate commerce, and further that decedent was at the time of his death engaged in his duties as an employee of the Northern Pacific Railway Company.

You are instructed that an employee of a railway company is never relieved from exercising reasonable care for his own safety and the safety of his fellow employees and cannot cast the burden of such care upon his employer. He owes this duty to himself and his fellow employees. If you find from the evidence in this case that under all the circumstances, Engineer [247] Mely failed to exercise reasonable care for his own safety, then he was guilty of negligence; and if you further find that such negligence was the sole and proximate cause of his death, plaintiff is not entitled to recover.

A. E. Mely is dead, he cannot testify here and in this case it is to be presumed that at the time of his injury and death he was taking ordinary care for his own concern, and that he was obeying the law. These presumptions are a form of prima facie evidence, and will support findings, by you, in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with these presumptions, it is your duty to weigh that evidence against the presumptions, and also any evidence that may support the presumptions, and then to determine which, if either, preponderates. This also applies to all other employes that lost their lives in this action.

If you find from a preponderance of all the evidence that the defendant in this case was negligent, and its negligence was the proximate cause of the injury and death of engineer A. E. Mely, the defendant is liable in damages, although the defendant's

negligence [248] was not the sole proximate cause of the injury and death of A. E. Mely, and if you further find from the evidence that engineer A. E. Mely was guilty of contributory negligence, this fact shall not be a total bar to recovery, but the damages shall be diminished by you in proportion to the amount of negligence attributable to engineer A. E. Mely.

A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required of a railroad company in the exercise of ordinary care, to furnish its employees a reasonably safe place within which to work, increases or decreases as to the dangers that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary and in the absence of circumstances that caution him, or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption.

That is more or less a duplicate of an instruction I have formerly given. [249]

There has been introduced in evidence what is designated as rules 93, 99, 101, 108 and other general rules read to you from the Consolidated Code of Operating Rules and General Instructions. You are advised that these rules are promulgated by the Rail-

road Companies for the safe operation of their trains and do not have the effect of law.

You are further advised that it is for you to determine whether or not such rules are reasonable and regardless of any violation of the rules, whether the defendant was negligent in any manner and whether the negligence was the proximate cause of the death of the deceased Mely and whether the plaintiff Tillie Mely was damaged thereby.

This rule book you will be permitted to take with you to your juryroom.

You must weight and consider this case without regard to sympathy, prejudice, or passion for or against any party to this action.

Certain witnesses have been called here commonly referred to as expert witnesses; and insofar as the testimony of the expert witnesses is concerned you will consider that and treat it in the same manner as you [250] would treat any other testimony in the case. The simple fact that it was offered by experts does not compel you to take their testimony in preference to any other, but you should give the testimony of the expert witnesses the same weight and the same consideration, everything else being equal, as that of any other witness.

The value of an expert's opinion depends not only upon the qualifications and experience of the witness, but also upon the fact which he takes into consideration and upon which he bases his opinion. If the facts assumed and which are made the basis of the opinion are not established by the proof, then the opinion would have no basis upon which to rest

and would be of no value and the jury cannot take the facts assumed to be true simply because they were assumed but you will look to the proof to determine whether they are proven or not.

As I have stated to you plaintiff brings this action under a law of the United States known as the "Federal Employer's Liability Act." This law governs this case. Under this law—if you find for the plaintiff—she is entitled to recover only such an amount as would represent fair and adequate compensation for the money loss which the evidence may show that she has sustained by reason [251] of the death of her husband. I instruct you, that under this law, she is not entitled to compensation for wounded feelings, for loss of companionship; consortium, comfort of the deceased, or for sympathy. The true test is, what, in view of all the facts in evidence, was the probable money interest of the widow in the continuance of the life of her husband? The proper estimate may be arrived at by taking into account the occupation of the deceased, the income derived therefrom, the period of time that he would probably be engaged in said occupation, his health, age, and the contribution made by him from such income to his wife. The measure of recovery is such amount of damages as will fairly or reasonably compensate the widow of the deceased for the loss of money benefits she might reasonably have received if the deceased had not been killed.

I further instruct you that if you find for the plaintiff, any damages that you may award her must

be based upon the life expectancy of her deceased husband which was at the time of his death 17.40 years.

The fact that the Court has instructed you upon the rules governing the measure of damages is not to be taken by you as any indication on the part of the [252] Court that it believes or does not believe that the plaintiff is entitled to recover damages. This instruction is given you solely to guide you in arriving at the amount of your verdict only in the event that you find from the evidence and instructions given you by the Court that the plaintiff is entitled to recover. If, from the evidence and instructions, you find that the plaintiff should not recover then you will disregard entirely the instructions that have been given you concerning the measure of damages.

If, after deliberating on this matter, you determine that the plaintiff is entitled to recover, you should determine the amount by an open and frank discussion among your members and you should not arrive at any amount to be allowed by each stating the amount you think should be allowed, then adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict in such manner.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed upon a verdict your fore-

man alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble in using the form which will correctly reflect your finding. You will see that one form contains a blank space for the amount of damages you allow, if any, if you find in favor of the plaintiff against the defendant; another form will be given you on which there is no blank space in case you find for the defendant and against the plaintiff.

When you arrive at a verdict it will be returned into open Court.

It is now necessary for me again to take up matters of law with counsel. You will be excused for a moment and I will call you back.

The Court: Does Plaintiff have any exceptions to offer to the instructions?

Mr. Shone: None, your Honor.

The Court: Does the defendant have any exceptions?

Mr. McKeVitt: The Court having instructed the jury as to the law of this case and the jury not, at the time of taking these exceptions, having retired to consider its verdict—the defendant excepts to the failure of the Court to give defendant's requested instruction number 6, this exception is based upon the ground that under the evidence the defendant was entitled to have a specific instruction given to the jury that if they found that rule 93 of the Code had been violated, which rule was adopted for the safety, among other things, of the deceased Engineer Mely, then he was guilty of

negligence; the instruction, however, further provided that they must find that that negligence, if any, was the proximate cause of his death, in whole or in part. That completes my exceptions.

The Court: In passing on that instruction, the reason I rejected it was because, as a whole, I didn't feel that it should be presented to the jury. You may recall the jury Mr. Bailiff.

Mrs. Farmer, the alternative juror—you may be excused from further service here and I want to thank you for standing by.

The bailiffs will be sworn and the jury may retire to consider their verdict.

October 2, 1952—8:30 P.M.

The Court: Ladies and gentlemen of the jury, it was necessary for me to call you in here as it is somewhat irregular for me to send messages in to you in the absence of counsel, so I have called counsel here so that I can answer your question in their presence. I want to say to you that in the lengthy testimony that has been given here during the course of this trial, it has been difficult for me to remember the testimony, as I know it must be for you, however, and the only way I could go into it would be to take the necessary time to have the Reporter go over his notes—I think I can say to you though, that this train was ordered out and that there was no advice given by the person giving the orders to take this train out, whether he be called the train dispatcher or whoever it was, that there was another extra train proceeding on

the track, now, the question of whether that was negligence or not, for them not to so advise Mr. Mely, that is a question entirely for you to decide.

Juror: Your Honor, may I ask a question?

The Court: Yes, you may.

Juror: What we wish to know is—is there a railroad rule which makes it obligatory for a dispatcher to include such information in his orders?

The Court: That is a question, as I advised you—the rules that you have before you are rules adopted by the railroad companies, and if there is anything that is unreasonable in the operation of those trains that is not included in the rules, you have a perfect right to take that into consideration, as to whether you feel that that matter was negligence on the part of the railroad company, and if you determine that it was negligence—that is for you and not the Court, and any suggestion or inference that you might get from what I say you should pay no attention to that, because you are the sole judges as to whether or not the railroad company was negligent in sending this train out without advising of the train which was preceding it on the track, and I can say to you that the evidence shows that they did not so advise Mr. Mely.

Juror: We knew that they did not so advise and there was a discussion as to whether there is a rule making it obligatory on the part of the dispatcher to give that advice.

The Court: All I can say to you in regard to that is that I am not familiar with the rules—you

have heard all the evidence and you are to determine whether such a proceeding should be followed as to advise the operator of the train that there was another train on the main track. That is all I can say to you because that is a matter that you will determine.

You may step outside a moment but don't go to your jury room yet.

(In the absence of the jury.)

The Court: Now, counsel may take exception to anything I have said to the jury.

Mr. McKeivitt: Your Honor has just had the jury retire but not for the purpose of deliberation as yet, and I just want to make this observation. I can see why your Honor couldn't answer the juror's question and for the purpose of this record, and to answer the question of Juror Number 2. There has not been introduced in evidence any rule of this Company, the Northern Pacific Railway Company, defendant, that required the dispatcher at East Lewiston to advise Conductor Mely that 1648 had gone out ahead of his train. That was the exact question that the juror propounded to your Honor as to whether the evidence disclosed that fact. The record may show from the standpoint of the defendant Northern Pacific Railway Company that there is no rule of any kind or any character that required the dispatcher at Lewiston, on the morning of November 11, 1951, to have advised Engineer Mely or the conductor in charge of these trains that extra 1648 had preceded extra 6015 out of the East Lewiston yards. [258]

The Court: I don't know whether the train orders come from the dispatcher, or who they come from, but I know that both sides argued fully the question of the train dispatcher not giving this man any orders. I told the jury that I wasn't acquainted with the rules; that they had the book of rules and the only thing they could do was to determine whether or not whoever was in charge was negligent in not advising of the train on the track ahead.

The Reporter will note your exception.

The Bailiff will return the jury to the jury room for their deliberation.

The Court will be in recess. [259]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court in and for the District of Idaho, and

I certify that I took the testimony and proceedings in and about the trial of the above-entitled cause in shorthand and thereafter transcribed the same into longhand (typing), and

I certify that the foregoing transcript, consisting of pages numbered to 259, is a true and correct transcript of the evidence given and the proceedings had in and about the trial.

In Witness Whereof I have hereunto set my hand this 15th day of September, 1953.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed September 15, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP), to wit:

1. Complaint.
2. Answer.
3. Defendant's Requested Instruction No. 6.
4. Verdict of the Jury.
5. Judgment.
6. Motion to Set Aside Verdict and Judgment Entered Thereon, or in the Alternative for a New Trial, With Affidavits Attached.
7. Order Denying Motion.
8. Reporter's Transcript (Instructions of the Court Included in Transcript).
9. Designation of Contents of Record on Appeal.
10. Supersedeas Bond.
11. Notice of Appeal.
12. Order Extending Time for Appeal.
13. Exhibits Nos. 1 to 25, inclusive; 26-1 to 26-7, inclusive, and 27.

In Witness Whereof, I have hereunto set my

United States Court of Appeals,
Ninth Circuit

No. 14,037

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Appellant,

vs.

TILLIE MELY, as Administratrix of the Estate
of A. E. Mely, Deceased,

Appellee.

DESIGNATION OF RECORD ON APPEAL

The Northern Pacific Railway Company, appellant above named, hereby adopts the "Designation of Record on Appeal" which was served on attorneys for appellee on June 24, 1953, and filed with the Clerk of the United States District Court for the District of Idaho on June 25, 1953.

CANNON, McKEVITT &
FRASER,

By /s/ F. J. McKEVITT;

CLEMENTS & CLEMENTS,

By /s/ V. R. CLEMENTS,
Attorneys for Appellant.

[Endorsed]: Filed September 25, 1953.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT RELIES

In compliance with Rule 17 this appellant makes the following statement of points:

In support of its contention that the District Court should have granted its motion for a directed verdict made at the close of appellee's evidence and renewed at the close of all the evidence, appellant asserts:

(1) The evidence conclusively showed as a matter of law that the death of appellee's decedent was caused and brought about solely and alone through his own negligence, which was the direct and proximate cause of his death.

(2) The complaint as amended charged the defendant railway company with thirteen separate acts of negligence. At the close of all the evidence the Court withdrew eight of said charges from the jury's consideration and submitted to it for determination the following charges of negligence:

(a) Failure to provide A. E. Mely a safe place to work;

(b) Failure to give A. E. Mely any warning of any kind whatever of the obstruction and danger ahead;

(c) Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction so that

A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision;

(d) Failing to protect Train No. 1648 while it was in such obscure position aforesaid and in failing to protect Train No. 6015 from colliding therewith by notice, signal, warning flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track;

(e) Violation of Rules 99, 101 and 108.

There was no evidence to support subdivision (a) since it was not shown there was any defect in roadbed or equipment.

Referring to subdivision (b). The evidence disclosed that the decedent's death was caused by a rear-end collision between a train of which he was engineer and another train stationary within Yard Limits at Arrow, Idaho. No operating rule of the company required that the conductor in charge of the train standing within the yard limits protect the same against other trains.

With reference to subdivisions (c) and (d), the same reasons apply.

With reference to subdivision (e). The rules therein referred to did not apply to trains operating within yard limits or standing within yard limits and no evidence was introduced showing a violation of said rules.

(3) The evidence conclusively showed that the death of appellee's decedent was caused and brought about solely and alone through his own negligence in violating Operating Rule 93 enacted for the pro-

tection of himself and his co-employees. That rule provided:

“Within yard limits second and inferior class, extra trains and engines must move at restricted speed.”

The evidence conclusively showed that the train which was being operated by appellee’s decedent was an Extra train. “Restricted Speed” as that term is used in the rule above referred to is defined in the operating rules as follows:

“Proceed prepared to stop short of train, obstruction or anything that may require the speed of the train to be reduced.”

The evidence conclusively showed that when the caboose of the train stationary within yard limits first came into the view of the deceased engineer he was operating his train at such a rate of speed as rendered it impossible for him to “stop short” of the rear of said train. The speed of his train at said time was conclusively shown to be 47 miles per hour. The evidence further conclusively showed that the maximum speed for the type of train he was operating on the entire run leading up to the accident was thirty miles per hour.

In support of its alternative motion for a new trial, appellant states:

(1) The verdict and judgment are contrary to law.

(2) The verdict and judgment are contrary to the evidence and against the weight of the evidence.

(3) There was no substantial evidence that the appellant was guilty of negligence, which negligence in whole or in part contributed to the death of appellee's husband.

(4) The evidence conclusively showed that the sole and proximate cause of decedent's death was his own negligence.

(5) The Court erred in denying appellant's motion to direct a verdict in its favor at the close of appellee's case and at the close of all the evidence.

(6) The Court erred in failing to give the following instruction requested by the appellant or an instruction substantially similar thereto:

“The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:

“‘Within yard limits, second and inferior class, extra trains and engines must move at restricted speed.’

“The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:

“‘Restricted Speed — Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced.’

“I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.

“I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff’s decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.

“I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

“If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant.”

Exception to the Court’s failure to give the above instruction was duly and timely taken and noted.

(7) The Court erred in admitting over the objection of appellant the testimony of appellee’s witness, Merle C. Myhre, called by appellee for the sole purpose of testifying as an expert as to the meaning, interpretation and application of the rules of the appellant, Northern Pacific Railway Company, admitted in evidence and designated as “Consolidated Code of Operating Rules and General Instructions.” Said rules were plain and unambiguous and there was no necessity for appellee to have called an expert witness to testify as to their meaning and application.

(8) The Court erred in admitting over appellant’s objection Rules 99, 101 and 108 of the Consolidated Code of Operating Rules and General Instructions above referred to.

(9) The verdict of the jury was based upon a supposed fact not established by the evidence.

(10) The Court erred in submitting to the jury the question of the alleged failure of the appellant to provide appellee's decedent with a safe place to work.

(11) The Court erred in submitting to the jury the alleged negligence charged in the five subdivisions above referred to.

(12) Appellant timely moved during the trial in separate motions to withdraw from the jury's consideration each of the five alleged charges of negligence finally submitted to them.

CANNON, McKEVITT &
FRASER,

By F. J. McKEVITT;

CLEMENTS & CLEMENTS,

By V. R. CLEMENTS,
Attorneys for Appellant.

[Endorsed]: Filed September 30, 1953.